Supreme Court, U.S.
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In the

Supreme Court of the United States

SIGNATURE PROPERTIES INTERNATIONAL, LIMITED PARTNERSHIP, a Delaware Limited Partnership,

Petitioner,

v.

CITY OF EDMOND, a Municipal Corporation, Oklahoma County, Oklahoma,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the finality requirement set forth in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), to determine the ripeness of a substantive due process challenge to a land use regulatory decision that results in denying a landowner the use of his property apply to both a due process takings-type claim and an as applied arbitrary and capricious due process claim as found by some circuit courts, or does the *Williamson County* finality requirement for ripeness apply only to a due process takings-type claim but not to an as applied arbitrary and capricious due process claim as found by other circuit courts, and, if the *Williamson County* finality requirement does not apply to an as applied arbitrary and capricious due process claim, is Signature's arbitrary and capricious due process claim ripe for review?

2. Depending upon the answer to the first question presented, is the Tenth Circuit's ruling in this case of the unripeness of petitioner's substantive due process claims (both the due process takings-type claim and the as applied arbitrary and capricious due process claim or either one) in conflict with this Court's decision in *Williamson County* and subsequent related decisions?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Signature Properties International, Limited Partnership ("Signature"), a Delaware Limited Partnership. The limited partner of Signature is Yale University/Yale Endowment Fund, a specially chartered Connecticut corporation with its principal place of business in the State of Connecticut. The general partner is A&S Management Partnership, a Delaware general partnership, with its principal place of business in the State of New York. The general partners of A&S Management Partnership are Twodcap, Inc., Twodatin, Inc. and Peter James & Associates, Inc. Each of those corporations is a privately-owned corporation and they are incorporated in the State of Delaware with their principal places of business in the State of New York.

Respondent: City of Edmond, a Municipal Corporation, located in Edmond, Oklahoma County, Oklahoma.

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Petitioner, Signature Properties International, L.P., ("Signature"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is reported at 310 F.3d 1258 (10th Cir. 2002). The judgment (Pet. App. 44a) and memorandum opinion (Pet. App. 24a) of the United States District Court for the Western District of Oklahoma are not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) was entered on November 8, 2002. The Tenth Circuit denied a timely petition for rehearing on December 2, 2002. (Pet. App. 45a). This Court has jurisdiction under 28 U.S.C. §1254 (1).

CONSTITUTIONAL, STATUTORY AND MUNICIPAL CODE PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Section 1983 of Title 42 of the United States Code provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. . . ."

Chapter 21.16.100 and Chapter 22.21A of the Edmond Municipal Code. (Pet. App. 46a through 62a).

STATEMENT OF THE CASE

Nature of the Dispute

Signature is the current owner of the Oak Tree Country Club and certain developed and undeveloped land at Oak Tree, a planned unit development in the City of Edmond, Oklahoma[1]. In the late spring, 1998, a dispute arose between Signature and the City of Edmond as to which entity has the obligation to correct deficiencies (capacity or otherwise) in the public sewer system at Oak Tree, which is owned and maintained by the City. When the dispute could not be amicably resolved after negotiations for more than a year, the City refused to allow Signature to develop its property under the zoning previously approved by the City unless Signature agreed to rebuild or repair the public sewer system by the replacement of part of the existing public sewer system at

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[1]Signature operates the country club and is in the business of developing the unimproved land for resale to home builders or other developers. Signature does not build homes.

Oak Tree. The City's demand was contrary to city ordinances, which only required a developer seeking to connect to the public sewer to install the necessary sewer components to connect to the existing public sewer system for the development and pay a connection charge.

Judicial Proceedings in the District Court

As a result of the City's refusal to allow Signature to develop unless it met the City's demand, Signature brought an action in the district court seeking declaratory relief from the district court that the City has the obligation to maintain or repair/upgrade its own public sewer system and requesting injunctive relief requiring the City to repair the system. Signature further sued the City for damages under 42 U.S.C. §1983, claiming that the City, acting under the color of state law, had abused its police powers by its arbitrary, capricious, wrongful and illegal actions, and had deprived Signature of its substantive and procedural due process rights under the Fourteenth Amendment of the United States Constitution. Signature asserted that the City's demand was contrary to its own ordinance and that the City had abused the use of its police power by stopping Signature's development in an attempt to make Signature assume the City's obligation to maintain or rebuild the public sewer system at Oak Tree.[2] Signature

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[2]In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court held that the commission could not impose an easement on a landowner's property for the benefit of the public without paying just compensation for the easement. In so ruling, this Court noted:

> ". . . unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'but an out-and-open plan of extortion.'"

claimed that such actions constituted an invalid exercise of police power by the City and *goes so far as to have the same effect as a taking* of its business and property in violation of the just compensation clause of the Fifth Amendment. Signature also sought damages under state law on the basis that the City's wrongful actions violated its due process rights under the Oklahoma Constitution. The district court had jurisdiction to hear Signature's federal claims under 28 U.S.C. §1331 and Signature's state law claims under 28 U.S.C. §1367. Signature's state law claims were also properly before the district court under 28 U.S.C. § 1332. Signature is a Delaware Limited Partnership with its principal place of business in New York. Its limited partner, Yale University/Yale Endowment Fund, is a specially chartered Connecticut corporation with its principal place of business in Connecticut. Signature's general partner is A&S Management, a Delaware general partnership, with its principal place of business in New York. A&S partners are Delaware corporations with their principal places of business in New York. The City of Edmond is an Oklahoma municipal corporation. The amount in controversy exceeded $75,000.00. (See generally opinion, Pet. App. 1a, and memorandum opinion, Pet. App. 24a)

Id. at 839 (quoting other authorities). The characterization of extortion can be likewise be applied to the actions of the City in this case. Here, Signature retained its property but could develop only if it met the City's demands. The City did not take Signature's property for a public purpose. It used its police power to try to force Signature to assume its obligation. It abused its police power for which damages, not just compensation, is the appropriate remedy. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 196 (1985); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990).

The City contended that despite the wording of its ordinances it had the right to require Signature to rebuild the system and that Signature was contractually bound to do so based on letters written by a Signature employee. On the eve of trial, the City asserted that Signature's damage claims were not ripe because the City had not reached a final decision on Signature's development rights and, in any event, Signature must pursue an inverse condemnation proceeding in state court before it could proceed with its due process claim. *Id.*

Signature responded that its claims should be analyzed as a due process claim for damages, and not a just compensation claim. Pursuant to *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), Signature asserted that the City's actions were an invalid exercise of police power, and not an exercise of the City's power of eminent domain for which just compensation is required. *Id.* Under Oklahoma law, inverse condemnation proceedings are special proceedings in which a property owner may seek just compensation for what would otherwise be a valid exercise by a governmental entity of its eminent domain powers, but for the fact the government has not yet paid the just compensation. In those state court proceedings, the issue is not the propriety of the governmental action; the issues are whether the property owner is entitled to compensation and how much. *Mattoon v. City of Norman*, 617 P.2d 1347, 1347-49 (Okl. 1980). Separate claims for damages, as opposed to just compensation based on the fair market value of the property taken, cannot be asserted in an inverse condemnation proceeding. *Curtis v. WFEC Railroad Co.*, 1 P.3d 996 (Okl. 2000) (a condemnation proceeding is a special statutory proceeding and is not a civil action for damages or equitable relief). Here, if the City's actions

had been lawful, a taking could not have occurred and Signature would not have a claim. On the other hand, if the City's actions were unlawful - - as the district court finally ruled - - Signature had a claim for damages.[3]

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[3]Just recently in *Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), this Court refused to apply the categorical rule set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), to a Fifth Amendment takings claim based on a temporary prohibition against use of property and noted:

> Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. *Cf. Agins v. City of Tiburon*, 447 U.S., at 263, n. 9 ("Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense'") (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)).

535 U.S. at _____, 122 S.Ct. at 1484. During the sewer dispute here, Signature retained its property and as soon as the district court ruled the City could not lawfully impose its obligation to rebuild the sewer system on Signature, the City allowed Signature to proceed with its development. The district court, *citing Agins*, 447 U.S. at 263 n.9, found that Signature's property had experienced a fluctuation in value (Pet. App. 42a), which arguably would preclude a takings claim for just compensation, but not necessarily a damage claim. *See Tahoe-Sierra, supra.* However, the damages sought by Signature for the City's unlawful actions were not the fluctuation in the market value of its property; but rather, Signature sought damages for the wrongful interference it suffered with its business of selling developed lots to homebuilders and others. Signature's claim is for damages, and not

Based on those claims and issues, this matter was tried to the district court without jury. The district court entered a memorandum decision setting forth the court's findings of fact and conclusions of law (Pet. App. 24a) and entered judgment (Pet. App. 44a) in accordance with its memorandum decision. The district court declared that the City has the obligation to perform all necessary or desired upgrades to the public sewer system under its ordinances - - that the City could not force Signature to upgrade the City's sewer system - - and that Signature had not assumed and was not contractually obligated to assume the City's obligation under the ordinances or by virtue of letters written by a Signature's employee. (Pet. App. 35a-42a). The district court, however, stopped short of issuing an injunction that would mandate the City to make such improvements within a certain time frame or to allow Signature to proceed with its development.[4] (Pet.

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just compensation. ***The City itself could have avoided Signature's claim for damages simply by pursuing an action in court for a declaratory judgment, as Signature did, and by allowing Signature to develop while the action was pending. Instead, the City tried to use its police power to extort from Signature the money for a new public sewer.***

[4]Apparently, the district court believed that although no other reasons were stated for the City's decision to stop Signature's development other than Signature's refusal to surrender to the City's demand, reasons could develop in the future that may cause the City to decide to change land use at Oak Tree. However, the district court issued a warning to the City that if it stopped Signature's development again, Signature may have a claim for damages and noted that "[i]f the City does refuse to issue any more building permits, then Signature may have a takings claim." (Pet. App. 33a). Signature agrees that a Fifth Amendment takings claim may not have been ripe, but disagrees that a due process takings claim or an arbitrary and capricious due process claim is not ripe. *Williamson County, supra; Bateson v. Geisse*, 857 F.2d 1300 (9th Cir.1988); *Sinalao Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989) (a due process claim

App. 38a-39a). The district court further found that Signature's §1983 due process claims and state law claims for damages were premature and unripe for review on the basis that the City had not made a final decision with respect to Signature's development rights. (Pet. App. 31a-34a). The district court thus dismissed those claims without prejudice. (Pet. App. 44a).

Proceedings in the Tenth Circuit

Pursuant to 28 U.S.C. § 1291, Signature appealed the district court's judgment of dismissal of its damage claims and the denial of its request for injunctive relief concerning repair of the sewer. The Tenth Circuit affirmed the district court's judgment, finding that Signature's §1983 claims for damages were unripe on the basis the City's actions were not final (Pet. App. 7a)[5] and

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may be ripe even if a Fifth Amendment takings claim is not and may be pursued independently). After the court ruled, the City advised Signature that it could proceed with its Legacy plat.

[5]The statement by the district court that Signature conceded that a Fifth Amendment claim was premature is not entirely accurate. As stated previously herein, Signature suggested to the court that an inverse condemnation proceeding was not available to it under Oklahoma law and that it was not seeking just compensation for a taking. *See* nn. 3&4, *infra* at pp 6&7. Signature believed that its claim should be analyzed as a due process claim for damages, which can be pursued without pursuing a Fifth Amendment takings claim. *E.g.*, *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997). However, as Signature advised the district court, the court had jurisdiction to evaluate Signature's claim as a Fifth Amendment takings claim under the analysis set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Neither the district court nor the Tenth Circuit addressed the claim under a *Penn Central* inquiry. Those courts reviewed the case for ripeness under the *Williamson County* finality requirement for a due process challenge based on an invalid exercise of police power. However,

that the district court has not abused its discretion in refusing to grant injunctive relief that would have required the City to commence repair of its public sewer system. (Pet. App. 15a-19a) The Tenth Circuit further ruled that Signature's state law due process claims were likewise unripe for the same reason. (Pet. App. 19a-20a).

Factual Background

The zoning of Oak Tree is under a planned unit development (PUD). The City approved the PUD zoning in 1974[6] at the request of Unique Golf Concept (later known as Landmark Land Company). The Oak Tree PUD was approved for 1700 residential units, some commercial use and golf courses, tennis courts and club houses with restaurants.

In accordance with city ordinances, Unique designed a sewer delivery system that would have sufficient capacity to handle the demand created by the

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since the actions of the City meet the finality requirements and because inverse condemnation proceedings in state court are not available to Signature for its claim, this Court, as it did in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), upon a finding that Signature's claims are final and ripe for review, could allow Signature to pursue that claim as an alternative claim, if it so desires.

[6]The factual background that is provided is provided in more detail than, but is consistent with, the factual findings of the district court (Pet. App. 24a), and the facts summarized by the Tenth Circuit (Pet. App. 1a). The PUD is to be completed in five (5) years and if not completed within five (5) years the zoning reverts to the use prior to the PUD unless the City grants an extension of the PUD. An extension is granted upon a showing of continuing development of the property. Edmond Municipal Code, chpt. 22.21A.100. A PUD defines the type and number of units that can be developed on the land within the PUD. *Id.* at chpt. 22.21A.010-22.21A.020.

total build-out of the PUD at Oak Tree (1700 residential units, equivalent to a population of 5100 persons). The delivery system designed by Unique's engineers consisted of a lift station (later known as lift station #1) and a force main from the lift station through which all the sewage at Oak Tree would be pumped to the City's treatment plant through the City's interceptor lines.

Prior to the installation of the sewer system, the City approved the design as having the capacity to handle the sewage for the entire drainage basin for Oak Tree as required by the city ordinance. After the system was constructed and inspected in 1977, the City accepted the system as part of the public sewer system and became obligated to operate and maintain the system.

Five years later, in 1983, the City experienced problems with lift station #1 and requested that Landmark enlarge the wet well and increase the pump sizes at lift station #1. Landmark disagreed with the City's analysis of the problem and disagreed that it was its obligation to fix the problem since once the system was accepted by the City, the City assumed the obligation to maintain and repair the system. Landmark however eventually agreed to the City's request. At this same time, Landmark proposed a second lift station (known as lift station #2) be added. This new lift station was needed to collect sewage for new plats being developed on the west side of Oak Tree and then pump the sewage to lift station #1. Because these areas were being developed prior to other areas, the sewage from these areas would not flow by gravity to lift station #1. The City approved the proposal and once the construction was completed, the City accepted those components as part of the public sewer system.

During this same time period in 1983, an independent engineering consultant advised the City that its public sewer system, including the system at Oak Tree, had excessive inflow and infiltration problems (I&I) as a result of storm water flowing directly into the sewer system through leakage in the sewer lines. The engineers advised the City that the actual amount of inflow and infiltration (I&I) taken during heavy rainfalls increased the flow for the system by 8.3 times the average flow during dry weather. As a result of this large volume of actual rain infiltration, it is understandable that, although only thirteen (13%) percent of the residential units had been built by that time at Oak Tree, the capacity of the lift station was being exceeded during heavy rainfall.[7]

In 1985, the City hired another independent engineer to conduct an I&I study. That study indicated the same I&I problem as previously reported in the 1983 study. The report contained specific recommendations for Oak Tree. Specifically, the engineer recommended that lift station #1 be eliminated and lift station #2 be increased in capacity to take all of the flow from Oak Tree and pump it directly into a new interceptor line. Additionally, the engineer specifically recommended additional work be done in the Oak Tree area to eliminate extremely high inflow sources during wet weather conditions.

Despite these recommendations, the City did nothing. Approximately one year later, the City received complaints from residents who live by lift station #1 about odors from, and other problems at, the lift station. In response, the City had another study done. The City was

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[7]At trial city employees admitted that an I&I problem is a maintenance problem that the City, and not a developer, has the obligation to correct.

given three alternatives for correcting problems with lift station #1. Two of the alternatives called for the elimination of lift station #1. But again the City did nothing to correct the problems.

In late 1987, the City received more complaints from residents concerning lift station #1. In reviewing the matter, City employees concluded that the homeowners' complaints could be resolved if *Edmond constructs the proposed gravity sewer that was suggested in the 1985 engineering report.* After being threatened with litigation by a homeowner, the City advised Landmark and the homeowners that the plans were to abandon lift station #1 following the 1988 P.G.A. Golf Championship *so that Edmond may construct a gravity sewer and obtain easements from Oak Tree to install these lines*. However, this was never done. During this time period, the City approved another extension of the PUD for Landmark.

In 1991, the City received even more complaints from homeowners. The City again reviewed the proposals for replacing lift station #1, as stated in a previous study, and re-evaluated them for current cost. However, once again the City did not take any further action and chose to ignore the problem. In 1992, the City again extended the PUD for Landmark without any requirements.

In 1993, Landmark filed bankruptcy, and the federal government through the Resolution Trust Corporation (RTC) assumed control of Landmark's Oak Tree property and placed the property on the market to be sold through an auction. During the due diligence by the RTC for the sale, City personnel did not advise the RTC of the historic problems with the sewer system at Oak Tree. Signature decided to bid on Oak Tree and reviewed the documents provided by the RTC's due diligence. As a part of its own

due diligence, Signature's representatives met with the City and similarly were not advised of historic problems with the sewer system. The City never revealed the homeowner complaints with the sewer system, the two I&I studies, the recommended redesign proposed in the 1980's or its previous commitment to Landmark and complaining homeowners that it intended to replace lift station #1 at its expense. Signature was only advised that due to the topography of the land, if it desired to develop the northeast half of Oak Tree before developing the remainder of the west half, another lift station (lift station #3) needed to be added to collect sewage from the northeast quadrant and pump the sewage to lift station #1. Based upon those representations by the City and others, Signature had a cost analysis for development of Oak Tree prepared , including the costs of the additional lift station #3, and submitted a bid based, in part, on that cost analysis. Signature was successful in purchasing a portion of the Oak Tree property for sale through the auction and took control of its Oak Tree property in late 1994.

Shortly thereafter, in early 1995, Signature's representatives met with the City to discuss the platting of additional land and were advised for the first time that additional sewer capacity for the undeveloped land may be needed. The City stated that the apparent lack of capacity in the sewer system was a result of the system being designed to be built in phases and the capacity of the first phase was used up, thereby requiring new capacity for the undeveloped property. The City made those statements even though it knew that it had approved and accepted the Oak Tree sewer system as having the capacity to handle the entire build-out of Oak Tree of 1700 residential units and that the ability of the system to handle that capacity was being affected by the I&I

problem.

With the issue still in question, Signature submitted two new plats (Reserve and Heritage Park) for the east side of Oak Tree and plans for lift station #3. The City approved the new plats and Signature commenced construction. By the end of 1995, Signature spent $650,000.00 with commitments for an additional $400,000.00 on roads and other improvements. The City thereafter accepted the Reserve plats and approved the subdivision bond to build lift station #3 to service the Reserve.

However, before the City would submit an application to the Oklahoma Department of Environmental Quality for a permit to construct lift station #3, the City told a Signature employee that Signature had to agree to replace lift station #1 and the force main after a certain number of building permits were issued by the City. The City was now asserting Signature must not only add capacity for the undeveloped land, but also had to replace the current system servicing the homes built prior to Signature's purchase at Oak Tree. Without this new lift station #3, the sewage from the two new plats (54 lots) would have no place to go and the new plats would have been rendered worthless. Therefore, not only would the money already spent over $1 Million on construction be wasted, but the money from the 15 lots in the Reserve plat that had just been sold would have to be refunded. Without any authority, a Signature employee, fearing that the City would stop the development unless he agreed to the City's demand, wrote the City stating that Signature would rebuild lift station #1 if and when necessary.

In mid-1997, Signature requested an extension of the Oak Tree PUD. In 1998, while its application for a PUD extension was pending review, Signature proposed a design for the additional sewage capacity that it believed was required because the City represented the system was to be built in phases. The City rejected Signature's design and demanded that Signature rebuild lift station #1 and the force main. It was estimated that the cost to replace lift station #1 and the force main would exceed $1 million. When Signature refused, the City advised Signature of its employee's letters.[8] Signature advised the City that it had no knowledge of any such letter and that the employee did not have the authority to bind Signature. Signature requested evidence that the build-out capacity for the sewer system was designed to be added in phases as contended by the City and that it was Signature's obligation as only a connecting developer to an existing system to fund the reconstruction of the existing sewer system.[9]

Meanwhile, the City delayed approval of the PUD extension and an additional plat on a project known as the

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[8]Prior to the City's rejection of Signature's design solution, and unbeknownst to Signature, a homeowner filed suit against the City in state court in January, 1998 for nuisance as a result of the City's operation of lift station #1. That lawsuit is still pending and the City has not currently taken any action to correct the problems with lift station #1, despite the district court's decision in this case that it has the obligation to do so.

[9]The district court ruled that Signature was not bound by the letters to rebuild lift station #1 for many reasons, including the reasons the City made material misrepresentations to the employee to obtain the letters from him and that the employee did not have the authority to write the letters (Pet. App. A-3). ***The City did not appeal the district court's judgment in favor of Signature on that claim.***

Legacy. When further discussions to resolve the sewer dispute failed, the City denied the PUD extension and threatened to revert Signature's land from residential zoning to agriculture.

However, Signature learned that the City had approved a plat for another competing developer at Oak Tree and inquired why this developer could proceed while it could not. It was only after Signature pointed out this unfair treatment that the City, on January 25, 1999, approved Signature's Legacy plat and approved the PUD extension. The City then advised Signature that even though the PUD, which defines the type and the amount of residential and commercial development for the land, was extended, it could not move forward with its development and could not make improvements on its land, including the just approved Legacy plat, unless and until Signature met the City's demand for Signature to replace the total delivery system of the existing public sewer system that services the existing homes at Oak Tree.

The City thereafter advised Signature that, if it would not agree to the City's demand, the City might place a moratorium on the issuance of building permits for already developed lots. Having incurred a delay of more than 16 months in being able to proceed with its development and faced with an ultimatum from the City and the threat of a moratorium, Signature filed its lawsuit.

After Signature filed this lawsuit, the City, without notice to Signature and the public in general, placed a moratorium on the issuance of building permits. Even though Signature does not build homes and thus does not seek building permits, people who purchase lots from Signature do and the City was well aware that the moratorium, along with the prohibition against any further

development by Signature of the development, would stop all new sales activity at Oak Tree.

Prior to this moratorium, two members of the city council met with a competing Oak Tree developer and they discussed the allocation plan for the remaining permits. It was decided that only 21 permits would be issued prior to the moratorium and those permits would be issued on a first-come basis. With the advance notice, this developer obtained 16 of the 21 allotted permits.

Immediately thereafter, Signature received a letter from the City reaffirming that Signature could not proceed with improvements on its newly approved Legacy plat until it agreed to the City's demands. However, shortly after that, the City permitted the competing developer at Oak Tree to start construction of the improvements for his recently approved plat.

During the pendency of the lawsuit, in late July, 1999, an independent engineering expert for the City issued a report that the sewer system had the capacity to handle the addition of at least 200+ more homes. He also reaffirmed that the system had a severe I&I problem that affected the ability of lift station #1 to service homes during wet weather conditions. After learning of the report, Signature asked the City if additional permits could be obtained by purchasers of lots from Signature. The City did not respond. The City, thereafter in September, 1999, lifted the moratorium on the issuance of building permits. Once the moratorium was lifted, the City did not change position on its refusal to allow Signature to proceed with the improvements on its Legacy plat. It was not until the district court ruled that it was the City's obligation to upgrade its own sewer system, and not Signature's, that the City advised Signature that it could

proceed with the improvements on its approved Legacy plat.

As a result of the City's action and refusal to allow Signature to proceed with its development under the PUD, sales at Oak Tree for Signature dramatically declined, with no sales during the moratorium. For all practical purposes, Signature lost the ability to obtain a reasonable return on its investment, which also affected its ability to service the $15,000,000 debt on its property, during the twenty-two months from the end of January, 1999, when the City granted the PUD extension but refused to allow Signature to develop under the PUD, through the district court's decision in mid-October, 2000. Prospective purchasers lost interest in the Legacy project and other Signature projects because the projects could not go forward. The contract for the Legacy project with the prospective purchaser had to be canceled.

Since its ownership of Oak Tree and prior to the City's refusal to allow Signature to develop, Signature has made a profit for each year from 1995 to 1998. During the ongoing sewer dispute, its profits declined from $2,300,000 in 1997 to $300,000 in 1999. At the time of trial, Signature had suffered a loss in profit in excess of $4,500,000 due to the City's wrongful actions.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents important questions of law concerning a municipality's right to use its police power to regulate land use versus a landowner's right to protection against an invalid exercise of the police power that unlawfully prevents a landowner from developing his property for resale in violation of the due process clause

of the Fourteenth Amendment. The precise questions before this Court concern when a landowner's claim based on an unlawful exercise of police power is ripe for review.

Prior to and since this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the lower courts have struggled with the finality requirement. *See, e.g. Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), *aff'd after trial from remand*, 95 F.3d 1422 (1996), *aff'd*, 522 U.S. 687 (1999). Particularly with regard to landowners' claims that are based on an invalid use of police power, the resolution of the issue has resulted in divided courts of appeals and inconsistent opinions. Some circuits have found that when the claim is premised on an allegation that the municipality arbitrarily and capriciously denied a landowner the right to use his property, the claim ripened the moment the municipality acted in an arbitrary manner. *E.g., Eide v. Sarasota County*, 908 F.2d 716, 724-27, nn.14-17 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991); *Sinalao Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990) ; *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988); *see also McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997). Other circuits, such as the Tenth Circuit in this case, have held that even if the claim is recognized as an as applied arbitrary and capricious due process claim, the court must know how far the regulatory action goes in order to determine if the claim is ripe for review. *See, e.g., Taylor Investment, LTD, v. Upper Darby Township*, 983 F.2d 1285 (3rd Cir. 1993), *cert. denied*, 510 U.S. 914 (1993); *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996). Due to this conflict among the circuits over the reading of *Williamson County* concerning a land use claim based on an invalid

exercise of police power and the importance of a resolution of this issue to both governmental entities and landowners, the writ in the case should be granted so that this Court can resolve the issue. Signature's claim should have been found ripe under either analysis, but the Tenth Circuit specially rejected the finality requirement set forth by the Eleventh Circuit in *Eide*, *supra*, and refused to apply it to Signature's claim.

A review of this case is likewise warranted on the issue of ripeness because the Tenth Circuit's finding that Signature's claim is not ripe is in conflict with this Court's decision in *Williamson County* and recent decisions of this Court interpreting *Williamson County* and other related decisions. Just two terms ago, the Court, in *Palazzolo*, 533 U.S. at 606, accepted certiorari and reversed the Rhode Island Supreme Court's finding that the landowner's claim was not ripe. *See also Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). Here, the Tenth Circuit has misapplied the finality requirement set forth in *Williamson County* and the Tenth Circuit's decision is in conflict with *Williamson County* and subsequent decisions of this Court, even if the arbitrary and capricious analysis for finality suggested by the Eleventh and Ninth Circuits is incorrect.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT AMONG CIRCUITS CONCERNING THE FINALITY REQUIREMENT FOR RIPENESS THAT SHOULD BE USED DEPENDING UPON THE NATURE OF THE DUE PROCESS CLAIM BROUGHT.

In *Williamson County*, this Court articulated the finality requirement to be used in determining whether a landowner's claim that a governmental entity had enacted a regulation or made a regulatory decision that has either resulted in the landowner's property being taken without just compensation as required by the Fifth Amendment, even though a physical taking of the landowner's property has not occurred, or resulted in the landowner being unable to enjoy the use of his property in violation of the due process clause of the Fourteenth Amendment, is ripe. In regard to the first claim, the Court held that the claim is not ripe for review until a final decision has been made by the governmental entity as to how the regulation or regulatory decision will be applied to the landowner's property and until after the landowner has sought relief under state procedures for just compensation, if available, and has been denied compensation. 473 U.S. at 186-96. Concerning the second claim involving due process rights under the Fourteenth Amendment, the Court held that similar to the Fifth Amendment claim, the claim cannot be reviewed until a final decision is made as to how the regulatory decision applies to the landowner's property. *Id.* at 196-200. As noted by this Court, the distinction between the Fifth Amendment takings claim and the Fourteenth Amendment due process claim is that under the Fifth Amendment claim, the regulation goes too far and requires compensation in order for the taking to

constitute a lawful exercise of the government's power of eminent domain; whereas, under the due process claim of the Fourteenth Amendment, the regulatory decision is an invalid exercise of police power that goes so far that it has the same effect as a taking by eminent domain, even though it does not effect a taking for which compensation is required under the Fifth Amendment. *Id.* at 196.

As stated previously, since the *Williamson County* decision the lower courts have struggled with the precise definition of ripeness with regard to either a Fifth Amendment takings claim or a Fourteenth Amendment due process claim, and particularly with the Fourteenth Amendment due process claim. Some circuits, such as the Tenth Circuit in this case, have held that the *Williamson County's* ripeness standard applies to all due process claims. *See* cases cited *infra* at p.19. Others, however, such as the Eleventh Circuit, have held that the ripeness standard *in Williamson County* does not apply to an arbitrary and capricious due process challenge. *Eide, supra; see* other cases cited *infra* at p.11. Prior to *Eide*, the Eleventh Circuit in *Greenbriar v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), had held that the *Williamson County* standard applied to an as applied arbitrary and capricious due process claim. While recognizing that both a due process takings claim and an arbitrary and capricious due process claim concern an invalid exercise of police power, the Eleventh Circuit, in *Eide*, held that an arbitrary and capricious claim does not require the landowner to show the regulatory decision goes too far. The arbitrary and capricious claim is final in the Eleventh Circuit's view when and at the moment the government acts in an arbitrary manner and applies the arbitrary action to the landowner's property. In the Eleventh Circuit's view, the landowner asserting an arbitrary and capricious due process claim need not wait

past the moment his land is affected by the regulation to pursue his claim; whereas, a landowner asserting a due process takings claim must wait until the government has determined what level of use will be denied and what level will be permitted, which in some cases may require a landowner to reapply and submit subsequent applications for lesser use with the government before a due process takings claim will be ripe. 908 F.2d at 724-25, nn. 13-16.

Here, Signature asserted both an as applied arbitrary and capricious substantive due process claim and a substantive due process takings claim. Without saying what is left to be decided, [10] the Tenth Circuit found both claims to be unripe. In so finding, the Tenth Circuit specifically rejected the standard announced by the Eleventh Circuit. (Pet. App. 15a). While Signature believes its claims are ripe regardless of whether the *Williamson County* finality requirement governs both its arbitrary and capricious due process claim and its due process takings claim or the arbitrary and capricious analysis finality at the moment of application governs its arbitrary and capricious due process claim, [11] its arbitrary and capricious

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[10]Both the district court and the Tenth Circuit in their analyses overlooked the fact that even though the City lifted the moratorium on building permits for already developed lots, the City did not allow Signature to proceed with improvements on its undeveloped property, such as the Legacy plat, until after the district court ruled the City could not lawfully shift its obligation to Signature.

[11]See analysis in proposition II, *infra* at pp. 27-28. The City stopped Signature's development. The regulatory decision was applied and therefore under *Eide* the finality requirement for an arbitrary and capricious due process claim had been met. Since the City prevented Signature from proceeding with its development and no question existed over the type or quantity of development that would be allowed if the City's demand was met, the *Williamson County* finality requirement had also been met.

due process claim is without question ripe under the finality requirement set forth by the Eleventh Circuit in *Eide*. This Court should accept review of this matter to resolve the conflict among the circuits whether the *Williamson County* finality requirement applies to the ripeness issue for all due process claims and to determine the ripeness of Signature's arbitrary and capricious due process claim if this Court agrees the finality requirement set forth by the Eleventh Circuit in *Eide* should apply to an arbitrary and capricious due process claim.

II. REVIEW IS WARRANTED BECAUSE THE TENTH CIRCUIT'S FINDING THAT SIGNATURE'S DUE PROCESS CLAIMS ARE UNRIPE CONFLICTS WITH THIS COURT'S DECISION IN *WILLIAMSON COUNTY* AND SUBSEQUENT DECISIONS OF THIS COURT.

In this case, the Tenth Circuit held that Signature's due process claims were not final on the basis that the City had not made a final regulatory decision to what extent its ruling would affect Signature's development rights. In so finding, the Tenth Circuit analogized this case to a previous finding of a lack of ripeness in *Landmark Land Co. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989). In ruling that Signature's claim fails for the same reason the due process claims failed to be ripe in *Landmark Land*, the Tenth Circuit has decided an issue of law contrary to the finality/ripeness requirements announced by this Court in *Williamson County* and subsequent decisions of this Court.

As noted previously herein, this Court in *Williamson County* held that before a due process claim

is ripe for review under the theory that a regulatory decision has gone so far as to have the same effect as a taking by eminent domain so as to constitute an invalid exercise of police power, the Court must know to what extent the applied regulatory decision will limit the landowner's use of his property. In *Williamson County*, the Court held the due process claim was not final since the landowner failed to apply for a variance from application of the regulation to his property. A year later in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), the Court reviewed another case which asserted only a Fifth Amendment claim and again the Court held that a final decision had not been reached by the government since the holdings of the lower courts left open the possibility that some development would be permitted and thus the question of whether the property being taken or the extent of the property taken remained open.

Later, in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), the Court accepted review of another land use case and reversed the lower court's finding that the landowner's claim was unripe. In reversing, this Court stated that its decisions in *Williamson County* and *MacDonald* make two points clear about the finality requirement: "it applies to decisions about how . . . a plaintiff's own land may be used, and it responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Id.* at 738. Because the agency in question has no discretion, the Court held that the case was ripe for review since the only discretionary step left to the agency was to determine if it will enforce the decision. *Id.* at 744.

Recently in *Palazzolo*, the Court, in finding that the landowner's claim was ripe, noted that "[g]overnment authorities . . . may not burden property by acquisition of repetitive or unfair land use procedures in order to avoid a final decision." 533 U.S. at 621. The Court further noted that the "[r]ipeness doctrine does not require a landowner to submit applications for their own sake[;]. . . a petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty to the land's permitted use." *Id.* at 622.

Here, both the district court and the Tenth Circuit in ruling that this case is not materially different from the decision in *Landmark Land* did not say what remains to be determined. Signature established without question that the City refused to allow it to proceed with its development based on the sewer dispute. The City delayed the extension of the PUD and after granting the extension of the PUD, it still refused to allow Signature to proceed unless it met the City's demand to pay to rebuild lift station #1. What could be more final?

Then, while the lawsuit is pending, it placed a moratorium on building permits for developed lots. This resulted in further injury to Signature since the people to whom Signature sells lots no longer wanted to buy because they could not build on the lots. The City then sought the opinion of an expert, who advised that the system had the capacity to service at least 200 more homes. As a result the City lifted the moratorium on buildings permits, but still refused to allow Signature to proceed with the development of any other lots, such as its Legacy plat. It was not until the district ruled that the City could not impose its obligation to rebuild its public sewer system on Signature that the City allowed Signature to proceed with its Legacy plat.

This case is clearly different from *Landmark Land*. The *Landmark Land* case involved a zoning dispute. Landmark Land had originally obtained a rezoning of its property and submitted a preliminary site plan for commercial development. While Landmark Land's preliminary site plan was pending approval, a group associated with Tinker Air Force Base proposed a new zoning for the area, known as the Tinker Air Force Base Air Installation Compatibility Use Zone (AICUZ). The Tinker's AICUZ proposal and Landmark Land's commercial proposal were incompatible. Del City was faced with approving one or the other. After Del City tabled consideration of which zoning would be approved, Landmark Land sought both administrative review and judicial review in state court of Del City's refusal to issue building permits and let Landmark Land move forward with its commercial development. Landmark Land was unsuccessful in those efforts (presumably on the basis that Del City was still considering the proper zoning for the area). Landmark Land then brought an action in federal court, claiming that its zoning property had been taken without just compensation in violation of its Fifth Amendment rights and claiming that its Fourteenth Amendment due process rights had been violated. The district court dismissed both claims on the basis that the claims were not ripe because Del City had not reached a final decision on the proper zoning for the area. The Tenth Circuit affirmed, finding that Del City had not made a final decision since "[t]he City has neither indicated definitively what level of development will be allowed on Landmark Land's property, nor finally and officially ruled out the possibility that Landmark Land will be able to proceed with its original plans." *Landmark Land*, 874 F.2d at 721.

As opposed to the facts in *Landmark Land*, the proper zoning or use of the property was not an issue when the City wrongfully stopped Signature in its efforts to proceed with its development. Signature's use of the property had already been approved by the City through the PUD extension. The PUD defines the use any developer can make of property at Oak Tree.

The fact that the City lifted the moratorium and would not comment on the number of permits available does not make Signature's claim unripe. It only proved that the moratorium was not necessary at the time it was imposed. The lifting of the moratorium only to some extent lessened Signature's damages as some people began to show an interest in the developed lots, but others still refused to buy due to concerns that the sewer still had a problem and the court had not yet resolved who would be responsible. The City itself could have sought a declaratory ruling on whether it or Signature had the obligation to repair the sewer system. Rather, it chose to use its police power to wrongfully force Signature to assume the City's obligation through its refusal to allow Signature to proceed with the improvements on its approved plat and through the unnecessary moratorium. The City should not be allowed to escape from having to pay damages to Signature for its wrongful actions on the fact Signature's damages may have been lessened by the lifting of the moratorium. After the moratorium was lifted, the City still would not let Signature develop its approved plat until after the district court ruled.

Contrary to the rulings of the district court and the Tenth Circuit, the City made a final decision how it would apply its regulatory decision. The decision of the City in this case cannot be reconciled with this Court's decisions *in Williamson*, *Suitum* and *Palazzolo*. *See also Del Monte*

Dunes, 522 U.S. at 687. A review of the question is warranted.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be granted to review all questions presented by this petition.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 00-6403

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SIGNATURE PROPERTIES INTERNATIONAL LIMITED PARTNERSHIP, a Delaware limited partnership, Plaintiff-Appellant,

v.

CITY OF EDMOND, a municipal corporation, Oklahoma County, Oklahoma, Defendant-Appellee.

November 8, 2002, Filed

COUNSEL:

Robert C. Smith, Jr. of Monnet, Hayes, Bullis, Thompson & Edwards, Oklahoma City, Oklahoma, (James S. Drennan of Monnet, Hayes, Bullis, Thompson & Edwards, Oklahoma City, Oklahoma, with him on the briefs) for the Plaintiff-Appellant.

Richard J. Goralewicz and Carol Price Dillingham of Turner, Turner, Braun & Goralewicz; of Oklahoma City, Oklahoma, (Kenneth W. Turner of Turner, Turner, Braun & Goralewicz; Oklahoma City, Oklahoma and Stephen T. Murdock, City Attorney, Edmond, Oklahoma, with them on the brief) for the Defendant-Appellee.

JUDGES:

Before BRISCOE, HOLLOWAY and MCWILLIAMS, Circuit Judges.

OPINIONBY:
HOLLOWAY

OPINION:

HOLLOWAY, Circuit Judge.

I INTRODUCTION.

This appeal arises from a dispute between a real estate development firm and a municipality. Plaintiff/appellant Signature Properties purchased land in the town of Edmond, Oklahoma, defendant/appellee herein, which was part of a planned residential development called Oak Tree. A controversy developed over which party was responsible for improving or enlarging the sewer system for a part of the development that had been completed in previous years. After some period of maneuvering, Signature brought this suit in federal court alleging, *inter alia*, that the City had violated its constitutional property rights by preventing it from developing its land.

After trial to the court, the district judge granted declaratory relief to plaintiff on a state law claim, establishing that Edmond was responsible for the cost of improving the sewer system for the earlier developed portion of the land. The court rejected plaintiff's plea for an injunction and dismissed without prejudice plaintiff's claims for damages, holding that those claims were not ripe because there had been no final action by Edmond on which to base plaintiff's substantive due process claim. Plaintiff appeals.

Plaintiff Signature invoked the district court's jurisdiction under both *28 U.S.C. § § 1331* and 1332,

alleging that some of its claims arose under federal law and that diversity of citizenship provided an independent basis for jurisdiction over other claims. The complaint also invoked the jurisdictional grant of *28 U.S.C. § 1343* as the case addresses deprivation of Signature's civil rights guaranteed by the 5th and 14th Amendments.[1] This court's appellate jurisdiction is based on *28 U.S.C. § 1291.*[2]

II

A

THE BACKGROUND OF THE OAK TREE DEVELOPMENT AND ITS SEWER PROBLEM

In 1974, an entity known as Unique Golf Concept, Inc. proposed the Oak Tree residential development as a "planned unit development" (PUD).[3] The project included two golf courses and a country club as well as planned residential areas. Landmark, the successor to the original developer, went into bankruptcy, and plaintiff Signature, the owner and developer of other projects combining golf courses and residential areas, purchased Oak Tree from the Resolution Trust Corporation (RTC) in 1994. The Oak Tree project was located in Edmond, a relatively large municipality adjacent to Oklahoma City.

The sewer system installed in the first phase of the Oak Tree project included a lift station, known as lift station no.1, and a "force main" line. The system was designed so that all sewage from the development would flow to lift station no.1 and then be pumped through the force main to the city's main line leading to the city's treatment plant. The system was constructed by Unique, the original developer, and its capacity was intended to be adequate to serve the entire development, which was planned to consist eventually of 1700 residential units, housing approximately 5100

people. Edmond approved the design and in 1977 accepted the completed system.

Problems with the sewage system had begun at least as early as 1983, long before plaintiff Signature came on the scene. In that year a study of the problems revealed excessive "inflow and infiltration," meaning that rain water periodically came into the system in a volume exceeding the system's capacity. A second lift station was added in 1983 as had been planned earlier; this was not a response to the inflow and infiltration problem. The sewage ran from lift station no.2 to lift station no.1, which continued to pump the effluent from the entire development. A second study in 1985, undertaken after complaints about overflow continued to be received by Edmond, again found the problem to be inflow and infiltration.

When considering making the purchase of Oak Tree from the RTC, plaintiff Signature undertook a substantial project of "due diligence," that is an effort to learn about the project to ensure that its decision would be a well informed one. Plaintiff's interviews with Edmond representatives and staff and plaintiff's review of the RTC's previous due diligence work yielded no information about the inflow and infiltration problems that had existed for over ten years. Instead, plaintiff's representative was told that "all utilities had the capacity for full buildout and there were no problems." Dist. Ct. Memorandum Opinion at 3, I App. 130.

It was not until some months after its 1994 purchase of Oak Tree that plaintiff was told of problems with the sewer system. Bob Bode, who held the title of Director of Development for plaintiff, met with representatives of Edmond regarding plans for two plats. These meetings included discussions of the necessity of building a new lift station, lift station no.3. As a result of these discussions, Mr. Bode wrote two letters which, Edmond

was later to assert, committed plaintiff to replacing lift station no.1 and the force main. One of plaintiff's proposed plats was approved in November 1995, and the second was approved in January 1996. As far as the district court's opinion reveals, there was no substantial conflict between the parties for the next year or more; presumably plaintiff was developing the most recently approved plats. Soon, however, the parties were at odds.

B

THE LEGAL CONTROVERSY

By city ordinance, a planned unit development (PUD) must be completed within five years or the city must grant an extension of the PUD. If neither of these events occurs, then the zoning reverts to the previous use, which for the Oak Tree area was agricultural. Obviously then, a developer like the plaintiff has a great interest in obtaining an extension of the PUD.

The district court found that in 1997 the renewal of the PUD "was looming," from which we infer that plaintiff had requested an extension and that the request was pending before the city council or the planning commission. Mr. Chris Ansley, general partner of plaintiff Signature, asked Bryan Coon, an engineer who had worked for plaintiff before, to develop a plan for increasing the sewer capacity. The resulting proposal was rejected by the planning commission in the summer of 1998.

At approximately the same time, plaintiff began plat development for a portion of Oak Tree that it called "the Legacy," and contracted with a builder for the planned construction of 33 units. In the summer of 1998, planning commission approval was denied. At this time, Edmond officials showed Mr. Ansley two letters written by Mr. Bode, previously mentioned, which purported to commit plaintiff to upgrading the sewer system.

Edmond hired Mr. Coon to draft a new proposal for increasing existing sewer capacity. Mr. Coon's second proposal, which would have had Edmond assume a proportionate share of the costs based on the number of homes in the development which had been built before plaintiff's projects, was also rejected by Edmond. By this time, plaintiff had become "armed with the full history of sewer problems and legal opinions on the effect of relevant [City of Edmond] Code provisions." (As will be discussed below, the district court held that under provisions of the municipal code, Edmond's acceptance of the original sewer system in 1977 made it responsible for any future improvements.) Plaintiff refused to assume responsibility for costs attributable to improvements for previously completed projects. I App. 132.

In January 1999, after a considerable delay, Edmond extended plaintiff's planned unit development for another five years. Shortly thereafter, though, Edmond decided that only 21 additional building permits would be approved, instead of the 100 that had previously been decided upon. And Edmond continued to press Signature to undertake the improvement and expansion of the original sewer system, threatening to impose a building moratorium if Signature refused. Signature then filed this lawsuit on February 23, 1999.

Edmond then imposed a moratorium on building permits, without giving notice of the length of the moratorium or of its previous decision to approve 21 additional permits before the moratorium became effective. J.W. Armstrong, a builder aligned with a rival developer, was told in a private meeting with the mayor that 21 permits would be given on a first come, first served basis. Armstrong received 16 of the 21 permits; he had only 16 lots available for building at the time.

Later in 1999 Edmond received an engineer's report on the sewer system which indicated that more than 21 additional homes could be built, but not giving a maximum number that the system could support. Edmond then lifted its building moratorium, but did not communicate its decision to plaintiff despite repeated written and oral requests and demands for information; instead, Edmond merely published a notice in a local newspaper. I App. 133. Due to the moratorium, plaintiff could not obtain financing for its next development phase, which was delayed for at least one year. *Id.*

III

THE DISTRICT COURT'S RULING

This case was tried to the court, apparently without objection, and the judge issued her findings of fact and conclusions of law in the form of a Memorandum Opinion. I App. 128-147. The judge noted that plaintiff had admitted that a Fifth Amendment takings claim would have been premature because it had not pursued an inverse condemnation action. Instead, plaintiff relied on the theory of a violation of its Fifth Amendment substantive due process rights, relying on *Williamson County Regional Planning Comm. v. Hamilton Bank, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).* n4 The judge noted that this court has held that under either theory the requirement of a final action by the governmental actor is identical, quoting from our decision in *Landmark Land Co. v. Buchanan, 874 F.2d 717, 720 (10th Cir. 1989), abrogated on other grounds, Federal Lands Legal Consortium v. United States, 195 F.3d 1190 (10th Cir. 1999).*

The district judge concluded that there was no final decision by Edmond, saying that the lack of finality was best illustrated by the fact that it was not at all clear which decision plaintiff was challenging. The judge

accordingly held that the constitutional Fifth Amendment substantive due process claim was unripe. Because plaintiff had shown independent jurisdictional bases for its other claims, however, the lack of ripeness did not result in lack of jurisdiction.

The district judge granted declaratory relief in favor of plaintiff, holding that Edmond was responsible for any needed improvements to the existing sewer system. Edmond's acceptance of the system from the original developer vested ownership of the system in the municipality by operation of a specific ordinance, and Edmond's responsibility for maintenance and improvements followed from its ownership, the court concluded.

The district court rejected Edmond's position that plaintiff was contractually bound by the Bode letters to upgrade the existing sewer system. The judge commented on the weakness of Edmond's evidence regarding the scope of Bode's apparent authority as agent for plaintiff but made no ultimate determination of that issue. Instead, she concluded that the letters did not in any event show an agreement on all essential terms. She further held that even if a contract had been formed, plaintiff would be entitled to rescission because of Edmond's failure to disclose essential facts, including the history of problems with lift station no.1 and its previous commitment, made to a predecessor of plaintiff, to replace lift station no.1 itself. Edmond's failure to disclose such material facts before eliciting the letters from Mr. Bode gave Edmond an "unfair advantage," the judge concluded. I App. 145.

The judge refused to grant injunctive relief as requested by plaintiff. Plaintiff had sought an injunction requiring that Edmond allow plaintiff to develop the remainder of its property and to perform needed improvements to the sewer system. The district judge

concluded, however, that to grant the requested injunction would usurp Edmond's right to regulate land within its boundaries. In the judgment subsequently entered, plaintiff Signature's section 1983 claims were dismissed as unripe and its state law claims for damages were dismissed without prejudice. Plaintiff Signature appeals.

IV

THE DISMISSAL FOR LACK OF RIPENESS

We conclude that the district judge was correct in dismissing plaintiff's section 1983 claim without prejudice because the claim is not ripe for adjudication. The instant case is not materially different from the case cited by the district judge, *Landmark Land Co. v. Buchanan, 874 F.2d 717-22 (10th Cir. 1989)*. We there held that the same ripeness test, requiring a final action by the city, applied to a substantive due process claim as well as to a just compensation claim. We review *de novo* the district court's legal conclusion that the section 1983 claim was unripe. *Sierra Club v. United States Dept. of Energy, 287 F.3d 1256, 1263 (10th Cir. 2002); Coalition For Sustainable Resources, Inc. v. United States Forest Service, 259 F.3d 1244, 1249 (10th Cir. 2001); Roe No.2 v. Ogden, 253 F.3d 1225, 1231 (10th Cir. 2001)*. The plaintiff has the burden of producing evidence to establish that the issues are ripe, and we review the district court's findings of jurisdictional facts for clear error. *Coalition For Sustainable Resources, 259 F.3d at 1249*. A brief statement on ripeness will suffice to guide our inquiry:

> The ripeness doctrine cautions a court against premature adjudication of disputes involving administrative policies or decisions not yet formalized and felt in a concrete way by the challenging parties.

> The ripeness inquiry is threefold: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."

Roe No.2 v. Ogden, 253 F.3d 1225, 1231 (10th Cir. 2001) (quoting Qwest Communications Int'l, Inc. v. F.C.C., 240 F.3d 886, 893-94 (10th Cir. 2001)).

Plaintiff argues that its excessive regulation claim for arbitrary and capricious regulation is not an actual Fifth Amendment takings claim, but is nevertheless based on the Due Process Clause and brought under *42 U.S.C. § 1983.* In explaining the difference between its excessive regulation claim and an ordinary takings claim, plaintiff Signature cites Supreme Court precedent that under the excessive regulation due process theory

> government regulation does not effect a taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. . . . . The remedy for a regulation that goes too far, under the due process theory, is not "just compensation," but invalidation of the regulation, and if authorized and appropriate, actual damages.

Williamson County Reg. Planning Comm. v. Hamilton Bank, 473 U.S. 172, 197, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985) (footnote omitted). See Reply Brief of Signature at 15. In light of its distinct due process theory, Signature maintains that it has presented a section 1983 claim that *is* final for purposes of judicial review, contrary to the holding of the district judge here. *Id.* at 13.

Although the Court in *Williamson County* discussed a due process theory, the Court did not decide whether the theory is a valid one. Instead, the Court held that the claim in that case was not ripe, even if viewed as a due process claim rather than a takings claim. *473 U.S. at 199-200.* In so holding, the Court suggested that the finality requirement is the same for due process claims and for takings claims:

> Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. . . . Resolution of that question depends, in significant part, upon an analysis of the effect the . . . regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.

Id.

Following *Williamson County*, we have expressly held that the finality requirements are the same for due process claims and for takings claims. *Landmark Land Co. v. Buchanan, 874 F.2d at 722.* The facts of *Landmark* and of the instant case are very similar, and the district court relied on *Landmark* to support its holding that plaintiff's claim was not ripe. We agree.

In *Landmark*, the plaintiff planned to develop a shopping center in Del City, Oklahoma. The developer obtained a favorable zoning decision and in March 1983, it submitted a preliminary site plan to the municipality. The city responded with suggested changes, and planning proceeded over the next year with the developer submitting revised site plans, applications for grading permits, and other proposals, all of which were approved. The developer's plans soon were frustrated, however. The developer alleged that city officials, a county official, and officers of the adjacent Air Force base combined "to delay, to impede and ultimately to prevent" the development. n5 Apparently the primary attempt to obstruct the developer's efforts was to have the city adopt as an ordinance a suggested zoning plan for areas surrounding Air Force bases, under which the proposed development would not have been permissible. The developer in that case alleged that two Air Force officers, assisted by a county commissioner, "initiated pressure tactics" to persuade the city council to adopt the zoning plan.

The city council began considering the proposed ordinance at a meeting on February 27, 1985, but immediately tabled the matter for 120 days. The city manager informed the developer that no building permits would be issued pending consideration of the proposed ordinance. The developer unsuccessfully appealed to the Del City Board of Adjustment.

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Frustrated in its efforts, the developer in *Landmark* commenced an action in federal district court, contending *inter alia* that its rights to procedural and substantive due process had been violated and that the city's actions constituted a taking without just compensation. The district court dismissed the complaint without prejudice, holding that the developer's claims were not ripe because it had not obtained a final decision from the city determining what development would be permitted. On appeal, this court affirmed.

Our court's decision first held that Landmark's takings claim was not ripe because the city had not yet indicated definitely what development would be allowed, nor had the city finally ruled out the possibility of approval of the original plans. We noted that Landmark had only been subjected to about six months of delay as a result of the defendants' actions. *874 F.2d at 721*. Turning to the due process claims, we observed that "Landmark could recover on its substantive due process claim if it could show that Del City deprived it of property in an arbitrary fashion." *Id. at 722*. We went on to affirm the district court's holding that the substantive due process claim, like the other claims, was unripe:

> Before a federal court may step in and ascertain whether a local planning authority has taken property arbitrarily, however, it must allow the local authority a chance to take final action. Until it has a final action before it, a court is unable to evaluate whether property was taken and whether the local authorities' position was arbitrary. Thus, the *Williamson County*

> ripeness test applies with equal force to substantive due process claims.

Id.

We are not persuaded by plaintiff Signature's argument that the finality requirement is satisfied in this case. Plaintiff has failed to demonstrate any significant difference between the circumstances of this case and those of *Landmark*. n6 Although plaintiff was subjected to somewhat greater delay than was the landowner in *Landmark*, n7 that fact standing alone does not compel a different result in this case; plaintiff has not articulated any other distinction between the cases, nor has it cited any authority to lead us to distinguish this case from *Landmark*.

Plaintiff builds its argument from the premise that its due process claim is different from a takings claim, highlighting language from the Supreme Court which seems to summarize the difference succinctly. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 722, 143 L. Ed. 2d 882, 119 S. Ct. 1624 (1999)*, the Court distinguished the claim at issue from an ordinary takings claim by saying that the plaintiff developer's claim there was "not that the city had followed its zoning ordinances and policies but rather that it had not done so." n8 We infer that plaintiff's position is that its substantive due process claim is ripe because it is based on arbitrary actions which by their nature are not akin to the steps involved in most land use regulation cases. Thus, where in the typical case the developer and the local authority may find themselves engaged in a process of give and take, as alternative plans are proposed and various regulatory factors are considered, in this case Edmond attempted, without sound basis and at least arguably improperly, n9 to coerce plaintiff to upgrade the sewer. We infer that

plaintiff is arguing that this type of municipal action is qualitatively different from the process involved in most land use regulation cases and that our application of the finality requirement should take this into account.

Language in some cases has indicated that finality is quite different in the context of substantive due process claims such as plaintiff's. *See Eide v. Sarasota County, 908 F.2d 716, 724 n.13 (11th Cir. 1990)* ("a property owner's rights have been violated the moment the government acts in an arbitrary manner and . . . that arbitrary action is applied to the owner's property"). Nevertheless, we must reject this argument. First, the argument seems to prove too much because it would seem to emasculate the finality requirement entirely. Indeed, the quoted language from *Eide* is difficult to square with the actual holding of that case that the finality requirement for due process claims is, if not identical to that for takings claims, at least very similar to it. Moreover, this argument simply cannot be squared with our holding in *Landmark* that the finality requirement for due process claims is the same as that for takings claims.

In sum, because plaintiff has failed to demonstrate that the circumstances of the instant case are materially different from those with which we dealt in *Landmark*, we conclude that the district court did not err in concluding that Edmond's actions were not final and consequently that plaintiff's section 1983 claim was not ripe.

V

THE DENIAL OF INJUNCTIVE RELIEF

Plaintiff contends that the district judge erred when she refused to issue a mandatory injunction requiring Edmond to maintain and upgrade the sewer system for the older portion of Oak Tree. Opening Brief of

Appellant/Plaintiff Signature at 31-34. The right Signature seeks to advance by the injunction is not its constitutionally protected property right on which it based its section 1983 claim but, as we perceive it, a right which plaintiff enjoys with all other interested residents in having Edmond perform what plaintiff describes as a "proprietary" duty.

We are unpersuaded by plaintiff's attempt to frame the issue as one of law to be reviewed *de novo*. It is well established that injunctive relief is equitable and that the district court's decision to grant or deny an injunction is reviewed for abuse of discretion. *Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1231 (10th Cir. 1997)*. The district court's discretion is not unbounded, of course, and in particular its judgment is to be guided by "sound legal principles." *Id.* (quoting *Albemarle Paper Co. v. Moody, 422 U.S. 405, 416, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975))*. In addition, when a party seeks injunctive relief in federal court against a state or local government or governmental entity, concerns of federalism counsel respect for the "integrity and function" of those bodies, *Knox v. Salinas, 193 F.3d 123, 129-30 (2d Cir. 1999)* (quoting *Schwartz v. Dolan, 86 F.3d 315, 319 (2d Cir. 1996));* in other words, the federal court must be cautious about issuing an injunction against a municipality. And caution is especially appropriate in this case because the type of injunction sought is mandatory rather than prohibitory. *See Citizens Concerned For Separation of Church and State v. City and County of Denver, 628 F.2d 1289, 1299 (10th Cir. 1980).*

Plaintiff argues from the premise that the district court, in granting declaratory relief as sought by plaintiff, correctly determined that Edmond (and not plaintiff) is responsible for the upgrade and upkeep of lift station no.1, along with all other components of the

system as of the time that Edmond accepted the system from the original developer. Plaintiff maintains that by accepting the sewer system, under its own ordinances Edmond assumed the responsibility of ensuring that the system provided adequate service, a duty that plaintiff describes as proprietary. Edmond does not dispute plaintiff's argument thus far, and consequently we also take Edmond's responsibility for upgrading the older portion of the system as a starting point.

Plaintiff goes on to argue that the court had the authority under Oklahoma law to issue an injunction to require Edmond to perform the proprietary function, citing *Grantham v. City of Chickasha, 1932 OK 123, 156 Okla. 56, 9 P.2d 747 (Okla. 1932)*, and *Mesta Park Neighborhood Ass'n v. Continental Fed. Svgs. & Loan Ass'n, 1990 OK CIV APP 67, 796 P.2d 638 (Okla. Civ. App. 1990)*. These cases provide little support for plaintiff's position in the circumstances of this case. In *Grantham*, the Oklahoma Supreme Court held that a *prohibitory* injunction should have been issued against the enforcement of an ordinance which unconstitutionally discriminated against merchants from out of town. This unremarkable holding says little to us about the circumstances in which a *federal* court may issue a *mandatory* injunction requiring a municipality to perform one of its duties. In *Mesta Park*, the state intermediate appellate court held that a property owner should have been enjoined from converting a single residence building into a duplex because the conversion would have been a non-conforming use under the zoning scheme applicable to the property at the pertinent time. Again, this unremarkable holding has little bearing on the issue before us.

Edmond cites *Mayor of Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453, 471-72, 50 L. Ed. 1102, 26 S. Ct. 660 (1906)*, in which the Court reversed a grant of a mandatory injunction requiring a city to construct a sewer system. The Court there said that the lower court had erred in issuing the injunction because

> it had no authority to issue a mandatory injunction requiring the city to construct a sewer, irrespective of the exercise of discretion vested by law in the municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and the like matters; and we think that the exercise of this authority is primarily vested in the municipality, and not in the courts.

Id. at 472.

It is difficult to assess this exact holding, especially given the tension between the expression that the lower court had "no authority" and the somewhat weaker phrase that the authority is "primarily vested" in the municipal government, a phrase that can be read as implying that there is at least some authority in the courts. But this need not concern us. We note that the district judge expressed the same thoughts in her memorandum opinion. I App. 143. Whether or not *Vicksburg Waterworks*, which has not been overruled, stands for the proposition that the district court could not have issued the injunction plaintiff sought, it at least supports the proposition that the district judge was within her discretion in denying the relief because of her keen appreciation and understanding of the concerns expressed by our highest court ninety-six years ago,

concerns which still are valid because they are at the core of our federal system.

In sum, we find no abuse of discretion in the denial of injunctive relief.

VI

THE STATE LAW CLAIMS FOR DAMAGES

Finally, we address plaintiff's contention that the district court erred in denying relief on its state law claims for damages. In the briefs, these claims are described simply as "claims for damages under the Oklahoma Constitution, and the City's breach of its obligation under its ordinances." The district court disposed of the state law claims quite briefly, at best, with only two statements which may, or may not, have been meant to address the state claims in addition to the federal claims. First, the district judge said that because plaintiff's constitutional claims (apparently meaning only the federal constitutional claims) were held "barred for lack of ripeness or lack of proof, Signature is not entitled to recover damages." Memorandum Opinion at 19. The judge's opinion also stated that: "Signature retains its property and . . . has failed to establish any final decision restricting its development. It is therefore not entitled to damages." *Id.* at 20. Finally, the judge said that "having failed to establish a constitutional claim, Signature's prayer for monetary damages is DENIED." *Id.* In the separate judgment entered by the court the state law claims were dismissed without prejudice.

The argument presented in support of plaintiff's state law claims is sparse. Plaintiff asserts that Oklahoma law recognizes a right of action for deprivation of property rights not amounting to a taking and cites *City of Oklahoma City v. Daly, 1957 OK 209, 316 P.2d 129 (Okla. 1957).* That case involved physical injury to property caused by the use of heavy equipment on the

adjacent right of way. We do not find that it supports plaintiff's position in the circumstances of this case.

Although plaintiff argues that Oklahoma law, "like federal law," permits recovery of damages for violations of property rights, plaintiff says nothing about whether, like federal law, Oklahoma law requires that the governmental action be final, even though the district court seems to have implicitly assumed this to be the case from the summary disposition of the state law claims. Indeed, other than the inapposite case on physical injury to real property, plaintiff provides no authority to support its contention that Oklahoma law provides a damages remedy on the facts presented. We are satisfied that the ripeness requirement is the same for the state law claims as it is for the federal claims. *See April v. City of Broken Arrow, 1989 OK 70, 775 P.2d 1347, 1354-56 (Okla. 1989).*

We conclude that plaintiff Signature has failed to show that the district court erred in disposing of the state law claims for damages.

Conclusion

The judgment of the district court is

AFFIRMED.

Footnotes

n1 We note that the complaint did not include adequate averments to support the claim of diversity jurisdiction which plaintiff-appellant Signature asserts as to Counts I, IV, V and VI. Count I claims, *inter alia*, that Edmond is obligated by city ordinance and Oklahoma law to provide adequate sewage service for Oak Tree. Again under state law, Count IV avers an obligation by the city under ordinance and Oklahoma law to provide access to the public sewer system for citizens within the city's jurisdiction. Count V asserts a

state constitutional violation of Article II § 7 of the Oklahoma Constitution - under statute and procedural due process - by arbitrary actions of the City of Edmond.

As to these state law counts we note that the plaintiff is a limited partnership and the citizenship of the general partner and each limited partner should have been pleaded because complete diversity as between the partners and the adverse party is required under *28 U.S.C. § 1332. See Penteco Corp. v. Union Gas System, Inc., 929 F.2d 1519, 1521-1523 (10th Cir. 1991).* Nevertheless, we conclude that it is not necessary under the circumstances of this case to either remand to the district court for a determination of diversity of citizenship or to permit an amendment of the complaint under *28 U.S.C. § 1653*, the two alternatives discussed in *Penteco.*

The plaintiff properly invoked the jurisdiction of the district court under *28 U.S.C. § 1331* by pleading its federal constitutional claim. The district court therefore had supplemental jurisdiction of the state law claims, which arose from the same nucleus of operative facts, under *28 U.S.C. § 1367* ("The district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United Sates Constitution."). We also note that the only issue defendant has raised concerning the district court's jurisdiction is the contention that this matter does not constitute a case or controversy on which federal jurisdiction may be based, a contention which we reject.

n2 Defendant/appellee Edmond does not challenge this court's jurisdiction. The fact that most of plaintiff's claims were dismissed without prejudice does not create a jurisdictional impediment on appeal in these circumstances. *See Landmark Land Co. v. Buchanan,*

874 F.2d 717, 720 (10th Cir. 1989) (fact that district court had dismissed only the complaint, not the cause of action, not a barrier to appellate jurisdiction where dismissal was based on conclusion that claims were not ripe); *Hyde Park Co. v. Santa Fe City Council, 226 F.3d 1207, 1209 n.1 (10th Cir. 2000)* (dismissal with remand of state law claims was final order).

n3 Our recitation of the facts is based on the district court's Memorandum Opinion, I App. 128-147, which included its findings of fact and conclusions of law. There is no material dispute about the subsidiary findings and the controversy at this stage focuses on the legal rulings below.

n4 In each of the references to the Fifth Amendment, we are using that as shorthand for rights contained in that amendment as made applicable to the states under the Fourteenth Amendment.

n5 Because of the early dismissal of the case, the opinion refers only to the allegations. Like the panel in *Landmark*, we assume the truth of the allegations for purposes of analysis, without of course having any means to know whether the allegations were well founded or not.

n6 Plaintiff says that it challenged three decisions by Edmond: first, the decision to stop plaintiff from developing its Legacy plat; second, the imposition of the moratorium on issuance of building permits; and third, after the moratorium had been lifted, the continued refusal to allow plaintiff to develop and refusal to say how many building permits would be available, which left plaintiff unable to obtain financing to proceed. (Opening Brief of Appellant at 25-26.) We understand plaintiff's position to be that all three identified decisions were part of an overall plan to coerce plaintiff

into replacing or improving the sewer system serving the oldest portions of Oak Tree.

n7 Plaintiff Signature suggests several varying amounts of delay. See Opening Brief of Appellant at 14-15, 17, 18-20; Appellant's Reply Brief at 12. These different delay figures range from 16 months to 43 months suggested by plaintiff Signature. We note that the trial judge stated that "development has been delayed at least one year." Memorandum Opinion at 6.

n8 The Court was referring, however, not to the plaintiff developer's due process claim, but rather to its regulatory takings claim. Nevertheless, the description seems apt for the substantive due process claim at issue in this appeal, and we will assume, *arguendo*, that the language is pertinent.

n9 The district court's findings stopped short of deciding whether bad faith or other impropriety on the part of Edmond officials was present, but as noted *supra*, with respect to the Bode letters the judge did find that Edmond had an unfair advantage as a result of its non-disclosures.

FILED

OCT 19 2000

ROBERT D DENNIS, CLERK
U.S DIST. COURT, WESTERN DIST. OF OKLA.
BY _____ DEPUTY

No. 99-241

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SIGNATURE PROPERTIES INTERNATIONAL LIMITED PARTNERSHIP, a Delaware limited partnership,
Plaintiff,

v.

CITY OF EDMOND, a municipal corporation, Oklahoma County, Oklahoma,
Defendant.

MEMORANDUM OPINION

This action for damages and injunctive relief was tried to the Court on May 30-June 6, 2000. Counsel were permitted to file post-trial briefs and the Court, having now considered all evidence and other matters of record, enters this Opinion which shall constitute its Findings of Fact and Conclusions of Law.

Plaintiff, Signature Properties International, is a limited partnership, 90% of which is owned by the Yale

University Endowment Fund, and almost half of the remaining 10% is owned by Chris Ansley, the managing partner. The City of Edmond is a relatively large community which abuts Oklahoma City on its north side. Edmond's city government is administered by a mayor and city council and is based upon a city charter.

In 1974, Unique Golf Concept, Inc., eventually known as Landmark, proposed a residential development to be known as Oak Tree as a planned unit development (PUD). The original plan was that the sewage would be handled by a lagoon and be independent of the public sewer system. The City of Edmond, however, proposed that it extend its sewer, with contribution from the developer, to Oak Tree. The plan ultimately approved called for a lift station on the west side of the development which would pump sewage through the force main to the City's interceptor line. This plan, designed by Oak Tree's engineers Philips & Strong, was proposed to and accepted by the City of Edmond as a system sufficient to serve 5,100 people living in 1,700 residential units, or the ultimate build-out intended at Oak Tree.

Starting in 1983, problems arose with the sewer system at Oak Tree. A sewer study noted problems of inflow and infiltration (I&I) which were excessive at Oak Tree. A second lift station was added in 1983. This lift station was not built for the purpose of ameliorating the I&I problem but had been intended from the outset as a necessary component of the sewage system. The original concept of the sewage system was not changed by the addition of this lift station; Lift Station #2 simply forced the flow from that portion of Oak Tree to Lift Station #1 which continued to work as originally planned, i.e., pumping the entire effluent through a force main to the City's interceptor line.

In 1985, the City continued to receive complaints regarding sewer problems at Oak Tree. Another study was done which, again, found an I&I problem. Although the City has internal documents showing its belief and intent that the problem was the City's and not Oak Tree's, Landmark agreed to assist in resolving the problem by enlarging a wet well. Both Landmark and the City agreed to postpone any significant work until after the PGA tournament in 1988. The PUD was extended with no condition or discussion of the sewer problem.

Landmark eventually went into bankruptcy and, in 1994, the Resolution Trust Corp. (RTC) proposed selling Oak Tree at auction. Signature, the owner and developer of other residential/golf course developments, was interested in purchasing Oak Tree. Signature educated itself about the property in what has been referred to by all counsel and witnesses as a "due diligence." Ansley testified he spent 2-3 months doing due diligence and another 2-3 months on verification. He examined RTC's library of its own due diligence, and spoke with City of Edmond representatives and employees about Oak Tree. Everyone, then and now, agreed that if the east side of the north half were developed first, a temporary lift station would be necessary on the east side, for which Signature would be responsible.

Signature hired Bryan Coon, the engineer of record for Oak Tree who had conducted the survey and due diligence for RTC, to assist Ansley with City officials and to evaluate the cost of development. Despite two meetings with Director of Planning Bob Schiermeyer and other members of the city staff, no one ever mentioned the sewer problem to Ansley. Rather, he was told all utilities had the capacity for full buildout

and there were no problems. No employee or representative of the City of Edmond ever revealed the homeowner complaints regarding the sewer system, the two studies conducted by the City of Edmond during the 80's regarding the I&I problem, the recommended redesign proposed in the 80's, or any sewer requirements (other than the lift station depending on north side development) which would be imposed on the developer by the City of Edmond.

The sale of Oak Tree to Signature closed in December of 1994. It was not until after Signature purchased Oak Tree and began platting new developments that the City first indicated a problem existed with the sewer system. Starting in the fall of *1995*, Bob Bode, Director of Development for Signature at Oak Tree, met with the City representatives regarding plans and designs for two plats known as The Reserve and Heritage Park. During these negotiations, which included the required Lift Station #3, the City told Coon and Bode that Signature would be required to increase sewer capacity. They discussed replacing Lift Station #1 and enlarging the force main. The City representatives told Coon and Bode that the plan had always been that the sewer system would be developed in phases, as Oak Tree was built. This was the first notice to Signature regarding capacity problems. When Bode reported the discussions, Ansley questioned Bode and Coon about the responsibility to pay, but put off looking into future capacity in favor of designing Lift Station #3. The plat for the Reserve, including Lift Station #3, was approved in November 1995. in January 1996, the council approved the plat for Heritage Park.

In 1997, as the renewal of the PUD was looming and development for an area to be known as The Pointe was underway, Ansley asked Coon to develop a plan for

the sewer capacity Signature now believed was required to be built in phases. In January 1998, the planning commission had its first hearing on the requested extension of the PUD. Coon's proposal to expand capacity was rejected in the summer of 1998, when the City stated it would allow no more lift stations to be built. At approximately this same time, Signature began the plat development for The Legacy, a zero lot line low/no maintenance development with 33 planned units. Signature contracted with Prestige Homes to build the units, with Signature to fund and build the infrastructure, recouping its investment when the homes were sold. In the summer of 1998, planning commission approval was denied. It was at this time that City officials showed Ansley two letters written by Bob Bode, purporting to commit Signature to upgrade the sewer system.

After the City rejected Signature's suggested sewer solution which had been drafted by Coon, the City hired Coon to draft a new proposal. Coon's second suggested allocation of costs, which would have Edmond assuming a proportionate share based on the homes preexisting Signature's developments, was rejected by the City. Likewise Signature, who was by this time armed with the full history of sewer problems and legal opinions on the effect of relevant Code provisions, declined to assume responsibility for the cost.

At the time Oak Tree was auctioned by RTC, it was divided into two parcels, The east side including the country club, two family golf courses, and 308 undeveloped acres was bought by Signature; the golf course and undeveloped land on the west side were purchased by Don Mathis. It appears there is a continuing competition not only between Signature and

Mathis, but also between certain builders who have aligned themselves with one or the other, most notably J. W. Armstrong. Armstrong had been a builder and developer at Oak Tree before Signature came on the scene and had worked with or for Mathis in a development known as Golf Club Estates which was in direct competition with Signature. Armstrong was, at the same time, part of a group of homeowners publicly voicing many complaints against Signature.

In January 1999, the City finally extended the PUD and approved the final plat of The Legacy. Mathis's Golf Club Estates was also approved. Coon Engineering, working on behalf of the City, had earlier concluded that an additional 100 homes could safely be added to the existing sewer system. By January 1999, the City concluded only 21 of this "safe" number of new homes remained unbuilt, The City then imposed a moratorium on issuing building permits. The City gave no notice of the length of the moratorium or the number of permits that would be given prior to its imposition or how the recipients would be chosen. However, J. W. Armstrong was told, in a private meeting with Mayor Rudkin and Councilman Huggins, that 21 permits would be given on a first come-first served basis. Armstrong got 16 of the 21 permits. He had only 16 lots at the time and no contracts to build on those lots. At least one permit was transferred to another builder.

Later that year the City hired Jon Nelson of FHC, a professional engineer, to review the sewer system. Mr. Nelson felt that more than 21 homes could be built but could not say how many more. The City then lifted the moratorium. Despite repeated written and oral requests and demands for information by Ansley and his lawyer, none of this was communicated to Signature. Instead, a notice was published in the local newspaper. Due to the

moratorium, Signature was unable to get financing on its development at The Legacy or plan further development of any kind. Development has been delayed at least one year.

The Bode letters are a pivotal issue in this lawsuit. During the discussions in late 1995 among City officials, Coon and Bode regarding the Reserve and Heritage plats, Bode became convinced that without some commitment to upgrade the sewer system, Lift Station #3 would not be approved, placing future development and his job in jeopardy. He proposed a solution in a letter dated December 2, *1995*, and modified it at the City's request in a second letter dated January 12, 1996.

The City claims Signature obligated itself through these letters - that Bode was authorized to bind Signature and that the letters constitute a valid contract to undertake the sewer repair and replacement outlined therein. Signature, on the other hand, claims that Bode did not have the authority to speak for Signature and never told Signature about the proposals. Chris Ansley claims the first he knew of these letters was during the negotiations in 1998 when the City presented them to him and demanded compliance. Moreover, Signature claims these letters do not meet many other prerequisites of a valid contract. The evidence is in sharp conflict. Bode testified at trial that he told Ansley of the letters and had his approval. On the other hand, Ansley testified he did not know of the letters, they were not in the appropriate file, unsigned copies were found deleted from the files of Bode's computer after he left the company, and no report was ever made of the sewer repair and replacement costs in his annual report to the limited partner. Bode lacked memory of critical events. His account of his "amicable" departure from the

company is completely lacking in logic or credibility. His obvious unease and animosity at being called as a witness, coupled with the City's payment of his expenses and $200 per hour "consulting fee" for the duration of his presence at trial lead the Court to conclude his testimony lacks credibility. Discrediting his assertion that he told Ansley about the letters, there is no evidence that Ansley knew or that Signature intended to be bound by the statements in the letters. Even without this finding, however, it is clear that the employees and officers of the City of Edmond did not make full disclosure to Bode about the nature and extent of the long-term sewer problem, the City's previous acknowledgment that it was responsible for it, or the code sections relevant to it.

After the letters were produced, Ansley denied both Bode's authority and Signature's knowledge of this purported agreement and clearly indicated his refusal to honor the agreement. He requested all of the City's files on the sewer at Oak Tree and, for the first time, discovered that the sewer problem dated back to 1983. This suit followed.

CONCLUSIONS OF LAW

The City filed a motion to dismiss well outside the scheduled deadline for dispositive motions. The Court announced it would not address the motion, but would consider the arguments at the conclusion of the trial. The City reasserted its jurisdictional argument and Plaintiff has responded in its post-trial brief.

A. The Constitutional law claims.

Signature argues that the City violated its rights by refusing to allow further development of its property. Signature argues the City's actions constitute an invalid

exercise of its police power by enforcing its statutes in an arbitrary and capricious manner thus violating Signature's Fourteenth Amendment due process rights. As support for its theory Signature directs the Court to Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 *(1985)*. The City argues Signatures claims are not ripe because Signature has not received a final adverse decision regarding application of Edmond's ordinances to its property. Signature concedes that under the Fifth Amendment, its action is not ripe because among other reasons it has not pursued an inverse condemnation case.[1] However, Signature argues that under the Fourteenth Amendment, it need only show that the actions taken by the City, in an invalid exercise of its police power, are final.

The "due process takings" theory has received much attention since Williamson County, although the Supreme Court has declined to specifically recognize it as a constitutional cause of action. In Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), cert. denied, 498 U.S. 1120, 111 S .Ct. 1073 (1991), the Eleventh Circuit clarified the finality requirement for regulatory takings claims, Although it recognized a distinction between the remedies available for a takings claim under the Fifth Amendment as opposed to a due process claim brought pursuant to the Fourteenth Amendment, the Eleventh Circuit noted that "[f]or a due process takings claim to be ripe, courts apply the same final decision requirement as in the just compensation claim context." Id. at 721 (citing Williamson County, 473 U.S. at 199-200, 105 S.Ct. at 3123; Smithfield Concerned Citizens v. Town of Smithfield, 719 F.Supp. *75*, 8 1-82 (D. RI. 1989)). The Tenth Circuit has also recognized the ripeness standard for the two theories of relief is identical:

A section 1983 inverse condemnation claim under the Fifth and Fourteenth Amendments for a regulatory taking is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson County, 473 U.S. at 186, 105 S.Ct. at 3116.

Landmark Land Co. of Oklahoma, Inc. v. Buchanan, 874 F.2d 717, 720 (10th Cir. 1989) *(abrogated on other grounds in* Federal Lands Legal Consortium v. U.S., 195 F.3d 1190, (10th Cir. 1999)).

That there is no final decision, ripe for review, is best illustrated by the fact that it is not at all clear which decision Plaintiff is challenging. If it is the moratorium on building permits, that decision has itself been vacated. Building permits are now being issued and there is no proof that the number which will be permitted has been reached or what the City will do when it is. Until a refusal to issue more is challenged and upheld, there is no final action regarding building permits that can be reviewed. If the City does refuse to issue any more building permits, then Signature may have a takings claim. However that is not the case. Rather, there exists some number of permits which are available. The fact that the City has not set a definite number is immaterial. Further, Plaintiff has not made a showing sufficient to establish a temporary taking since even during the moratorium Plaintiff was not deprived of all use of its property.

If Signature is challenging the extension of the PUD, although that process took longer than normal and longer than would perhaps be justified, the PUD was, in fact, extended and no decision in this regard need be reviewed.

If the challenged decision is regarding plat approvals, either preliminary or final, again it is premature. There are no plats presently under consideration and none have been denied.

If Signature is challenging the City's decision to enforce compliance with the Bode letters as binding contracts, that is not a regulatory decision and therefore, not subject to Fourteenth Amendment review.

Of course, it is clear Signature is challenging the City's decision that Signature is financially responsible to repair or replace the sewer to the City's satisfaction, but that is a decision which has not yet been announced or enforced in the context of a regulatory decision. Plaintiffs constitutional challenge is simply not ripe.

Signature's concession that any Fifth Amendment claim is not yet ripe eliminates any claim for a Fourteenth Amendment procedural due process violation. The Tenth Circuit has held that "until a plaintiff has resorted to the condemnation procedures to recover compensation for the alleged taking, the procedural due process claim is likewise not ripe because it is in essence based on the same deprivation." Rocky Mountain Materials & Asphalt, Inc., v. Board of County Commissioners of El Paso County, 972 F.2d 309, 311 (l0thCir. 1992).

Plaintiff intertwines its argument that its claim is ripe for review with factual statements which appear to support an argument that the pursuit of a final decision would be futile. The possibility that futility may excuse the final decision requirement has been acknowledged. Landmark, 874 F.2d at 722; Eide, 908 F.2d at 726-727 (see also Eide, 908 F.2d at 726. n. 17, for the more restrictive view in the Seventh and Ninth Circuits).

Given the instantaneous filing of this suit, the City's change of mind and policy since this dispute arose, and the lack of certainty over precisely what Plaintiff claims to be unconstitutional, futility is not an appropriate conclusion under these facts.

This finding does not deprive the Court of jurisdiction, however, as Signature has asserted state law and declaratory and injunctive claims which do not depend on a final decision for ripeness. The City's argument that all claims should be dismissed on either the theory that exhaustion of a state remedy is required or that the questions should be certified to the state supreme court are without support and are rejected.

B. The Declaratory Judgment Claims.

Diversity jurisdiction exists between Plaintiff and Defendant in this case. As provided in 28 U.S.C. § 2201, Signature seeks a judgment declaring its rights under the municipal code of the City of Edmond. Signature further seeks an injunction requiring the City of Edmond to follow its code.

The City first cites to the preamble and art. 1, § 3 of the city charter, arguing that its responsibility for public health and general welfare, recited in each of those provisions, supports the decision that Signature is financially responsible for the sewer upgrade. Neither of these provisions, however, is relevant to the question of which of the parties to this suit is required to pay for a safe and sanitary sewer system.

The City points to ordinance 737, codified at chapter 22.21-A of the Edmond Municipal Code, which specifies the rights and responsibilities for PUD development. Under ordinance 737, the developer must

submit a design statement for City approval. Every five years thereafter, until the development is fully built out, the PUD zoning must be renewed, Thus, the ordinance requires a newly filed design statement every five years. A further provision of ordinance 737 requires a statement of utility lines and service with the following caveat:

nor shall acceptance of this statement preclude the City from imposing additional requirements for improvements as they are recognized in the course of more detailed planning or as technical standards and ordinances change.

This code provision permits the City to increase its requirements on development and developers during the planning process, but the "acceptance" referred to in the ordinance is not the acceptance of the sewer system, but the acceptance of the statement required during the planning process. Moreover, in this case it is undisputed that no technical standards or ordinance changes have arisen since the Oak Tree sewer was first accepted by the City; nor can the Court conclude that the "more detailed planning" referred to in the code provision means building more houses. Thus, this section is not applicable to the present action.

The City's Municipal Code clearly states that once a sewer system is accepted from the developer, ownership of that sewer system is vested in the city. *See Edmond, Okla., Code chap.* 21.16.100(D)(1). Moreover, the City's conduct has been consistent with this code provision, for as reflected in the Findings of Fact, until recently, the City accepted responsibility for maintaining the system. Indeed, the evidence at trial was that the problem with the sewer at Oak Tree is not lack of capacity, but I&I, which existed well before Signature

bought the property and is clearly the City's responsibility. Despite its own actions, the City argues that under its ordinances Signature is responsible for upgrading the system to accommodate the additional development. The ordinances do not support the City's position. *Edmond, Okla., Code chap.* 21.16. 100(B)(3) provides "[d]evelopers constructing sewerage systems are required to construct said systems with adequate capacity and at such depths as to permit future extension to serve the entire drainage area upstream from the point of consideration." Thus, the obligation to construct Lift Station #1 to be adequate to handle future development was upon Unique Golf Concepts, Inc., when the station was first constructed in the late 1970's. That construction was overseen, inspected and accepted as adequate by City. If there is a deficiency or if the plans were in error, that responsibility falls on the City, not Signature. The City has offered no argument supporting the imposition of an obligation upon Signature to upgrade the City's property. Likewise, there is no support in the municipal code for the City to take such a position.[2] The illogic of the City's position is further underscored by the fact that if Signature were required to upgrade the sewage system as demanded by the City, Signature, and any future homeowners, would bear the burden of upgrading sewer systems for current homeowners with no means of recouping that investment. Such a position is not only contrary to common sense, it ignores the provisions of Edmond Municipal Code. Section 21.16. 100(C)(2) of that code provides a mechanism for developers to recover the costs of building a sewer system which provides a benefit to other users. If the Court acted as requested by the City that section would be rendered meaningless. See Fuller v. Norton, 86 F.3d 1016, 1024 (10th Cir. 1996) ("We avoid interpreting statutes in a manner that makes any part superfluous".).

Signature requests this Court to enter an injunction ordering the City to permit it to develop the remainder of its property and further ordering the City to perform any needed upgrade to the sewer system. Clearly, without regard to any sewer issues, the City has the right to control development within its boundaries and therefore could restrict Signature's development. The City retains this power notwithstanding its approval of the PUD. "The Supreme Court has recognized that land-use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to the full extent it may desire." Hoehne, 870 F.2d at 532-33 (citing MacDonald, 477 U.S. at *353*, 106 S.Ct. at 2569).

By virtue of its acceptance from Unique/Landmark and its municipal code, the City owns Lift Station #1 and its attendant sewer mains. Therefore, any necessary or desired upgrade is the City's responsibility. Under the City's municipal code, Signature's sole responsibility is to provide an adequate sewer system for that area it seeks to develop, Thus, the City can certainly require Signature to install sewer lines for any new development to a point where they will connect with the City's system. Likewise, if it is necessary to build a new lift station to handle sewage for that new development it is within the City's authority to require Signature to build that lift station. What the City cannot do is what it seeks to do here — force Signature to upgrade the City's property.[3] However, Signature's request for an order requiring the City to upgrade the sewer system must be denied. If the Court ordered the City to upgrade Lift Station #1, so that Signature could fully develop its land as it wants, then the Court would have usurped the City's right to regulate land within its boundaries. Such an act would have the two-fold effect of placing Signature's interest

above the legitimate interest of the City in protecting the health and welfare of its citizens and putting this Court in the position of determining for the people of Edmond how their City should be developed. That is something this Court will not do.

Consequently, Signature's request for injunctive relief requiring the City to perform any needed upgrade is denied. Likewise, this Court will not override the City's legitimate exercise of its police power by ordering the City to allow further development by Signature.

C. The City's Alleged Contract with Bode.

The City argues Signature agreed to replace Lift Station #1. In support of its position, the City points to letters exchanged between Bob Bode, representing Signature, and Jerry Smith, representing the City. In the letters Bode agrees to make the sewer modifications required by the City. While there is little dispute that Bode was in fact an agent of Signature, the parties are in sharp conflict concerning the scope of Bode's authority. The City has offered no evidence to support Bode having actual authority to enter a contract for the sewer upgrade. Rather, the City relies on Bode's apparent authority based upon the City's past dealings with Bode in relation to Signature developments. "Apparent agency develops from the acts of the principal himself and not from the acts of the agent," Wheeler v. Puritan Ins. Co., 720 P.2d 729, 731 (Okla. 1986). The City offers little evidence to establish acts by Signature sufficient to create apparent authority in Bode. However, regardless of the extent of Bode's authority to bind Signature, the evidence does not support the existence of a contract.

To establish a contract under Oklahoma law the City must show the parties were capable of contracting,

consent, a lawful object and sufficient cause or consideration, 15 Okla. Stat. Ann. § 2. Signature offers a number of arguments to dispute the existence of a contract. Of these, two are dispositive. First, the letters fail to demonstrate a meeting of the minds occurred. Beck v. Reynolds, 903 P.2d 317, 319 (Okla. 1995) ("In order to have a valid contract there must be mutual consent, or a meeting of the minds."). The letters do not demonstrate with a reasonable degree of certainty what the parties agreed to do. This becomes evident in light of the facts. The City contends the letters, in addition to obligating Signature to upgrade Lift Station #1, impose on Signature an obligation to move the lift station to a new location. However, the letters do not indicate that Lift Station #1 will be upgraded, but removed. Further, the Bode letters do not contain any details or specifications for the new lift station. Finally, although such a requirement is not contained in the letters, Jerry Smith testified that the City would have to approve any designs for the new lift station. The City has failed to meet its burden of proving it and Signature agreed on the essential details necessary to create a contract.

Signature next argues that even if the Court finds the letters to create a contract it should be relieved of that contract due the City's failure to disclose material facts. Signature argues the City's failure to disclose the history of the sewer amounts to a mistake of fact.

> Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:
>
> 1.An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,

> 2.Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

15 Okla. Stat. § 63. The evidence is clear that the City did not disclose to Mr. Bode or Signature the long history of problems with Lift Station #1. Likewise, the City did not disclose to the RTC that problems with sewer capacity might affect future development. Nor did the City disclose to Signature that it had told Landmark the City was going to replace Lift Station #1. Mr. Bode testified that had he been aware of these facts he would not have written the letters. The City's failure to disclose these facts prior to securing the alleged agreement from Mr. Bode gave the City an unfair advantage.

> "[W]here the mistake is of so fundamental a character that the minds of the parties have never, in fact, met, or where an unconscionable advantage has been gained, by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff either in falling into the error or in not sooner seeking redress, and no intervening rights have accrued, and the parties may still be placed in status quo, equity will interfere, in its discretion, to prevent intolerable injustice."

Lovell v. City of Altus, 246 P. 468,470 (1925) (quoting 1 Story's Equity Jurisprudence (10th Ed.) § 138).

Signature has established a number of facts which demonstrate the letters sent by Bode do not indicate a meeting of the parties' minds sufficient to

create a contract. Further, it is clear that prior to Bode sending the letters, the City and Signature had differing views regarding responsibility for upgrading the sewer and that the City misled Signature as to that responsibility. Consequently, the Court finds the letters sent by Bode do not create a contract. In the alternative, if a contract was created by the letters, the City's actions entitle Signature to recission of that contract. Lovell, 246 p. at 470.

D. Signature's Damages Claim.

Because the Court has found Signature's constitutional claims barred for lack of ripeness or lack of proof, Signature is not entitled to recover damages. Signature has not offered any evidence to the Court demonstrating a permanent loss of all economic use of its property. At best, Signature may have suffered some changes in the value of its property. This does not entitle it to recover monetary damages. "Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership." Agins v. City of Tiburon, 447 U.S. 255, 263 n. 9, 100 S.Ct. 2138, 2143 n. 9 (1980). Signature retains its property and, as discussed above, has failed to establish any final decision restricting its development. It is therefore not entitled to damages.

CONCLUSION

For the reasons stated herein, it is hereby ORDERED that Signature's § 1983 claims are DISMISSED without prejudice; Signature's request for a declaration of ownership of the sewer property in the City is GRANTED; Signature's request for injunctive relief is DENIED; finally, having failed to establish a constitutional claim, Signature's prayer for monetary damages is DENIED.

IT IS SO ORDERED this 19th of October, 2000.
ROSIN J. CAUTHRON UNITED STATES DISTRICT JUDGE

Footnotes

[1]Although Signature argues this Court has jurisdiction to decide an inverse condemnation issue **in** a diversity case, Signature concedes it has not asserted any claim allowing it to seek damages for inverse condemnation

[2] City did not argue that Signature is a successor to Unique in such a manner as to bear its liabilities, possibly because any such argument by City would be subject to a strong estoppel defense.

[3]However, were Signature to undertake upgrading or replacement of Lift Station #1 that action may well give rise to a claim by Signature against the City for the value imparted to the City.

No. 99-241

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SIGNATURE PROPERTIES INTERNATIONAL LIMITED PARTNERSHIP, a Delaware limited partnership,
Plaintiff,

v.

CITY OF EDMOND, a municipal corporation, Oklahoma County, Oklahoma,
Defendant.

JUDGMENT

This matter came on for non-jury trial on May 30 – June 6, 2000. For the reasons set forth in the Memorandum Opinion filed this date, judgment is hereby entered as follows:

IT IS THEREFORE ORDERD, ADJUDGED, AND DECREED that declaratory judgment is hereby entered is favor of Signature Properties International and that the City of Edmond owns the sewer at Oak Tree and is responsible for its maintenance and repair; on its claim for injunctive relief, judgment is entered in favor of the City of Edmond; Signature's claims under the Oklahoma and United States Constitutions and for damages are dismissed without prejudice.

DATED this 19TH day of October, 2000

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

No. 00-6403

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SIGNATURE PROPERTIES INTERNATIONAL LIMITED PARTNERSHIP, a Delaware limited partnership,
Plaintiff-Appellant,

v.

CITY OF EDMOND, a municipal corporation, Oklahoma County, Oklahoma,
Defendant-Appellee.

ORDER

Filed December 2, 2002

Before BRISCOE, HOLLOWAY and MCWILLIAMS, Circuit Judges.

Appellant's petition for rehearing is denied

Entered for the Court

PATRICK FISHER, Clerk of the Court

by:

Deputy Clerk

21.16.100 Sewers.

A. Definitions: The terms used herein shall include the following meanings:

(1) The Public Sanitary Sewer gathering system shall consist of service lines, lateral lines, main lines lift stations and force mains

(2) Service lines are those lines carrying sewage from individual dwellings or places of business to the lateral lines.

(3) Lateral lines are the gathering lines carrying sewage from the service lines to the main lines and shall be eight inches (8") in diameter except as approved by the City of Edmond

(4) Main lines are those lines carrying sewage gathered from a number of lateral lines to a central point for treatment. Main lines shall be designated as such by the City.

(5) Lift stations are any pumping facility used to lift sewage to a higher point and discharge into a force main or treatment plant.

(6) Force mains are any pipeline under positive internal pressure used to convey sewage from a lift station to a point of discharge.

(7) Drainage basins are those geographical areas as determined by the City so sited permitting conveyance of sewage by gravity to a point of consideration.

(8) Excess capacity sewer mains, lift stations and force mains are respective sewer system components

required to serve the ultimate upstream drainage basis needs and have a capacity in excess of the actual capacity required to meet the immediate needs of the area under consideration.

B. Public Sanitary Sewage System Connection, Extension and Installation Requirements for New Developments.

(1) Developers are required to connect the development to a public sanitary sewerage collection system or sewage treatment facility, obtain all necessary easements dedicated to the public as are required for such development and to provide adequate sewer laterals which are accessible to each lot. Said sewer system shall comply with specifications as approved by the City Engineer and the State Board of Health. When necessary the City may assist the developer in obtaining easements.

(2) Developers are required to extend the sewerage system lying within the development to the upstream junction(s) of the developments boundary with the drainage basin.

(3) Developers constructing sewerage systems are required to construct said systems with adequate capacity and at such depths as to permit future extension to serve the entire drainage area upstream from the point of consideration. The capacity shall include sewer lines, lift stations, and force mains as applicable.

(4) Where plans for the installation of sanitary sewers in the vicinity of the development have been prepared and approved by the State Board of Health and the City Engineer, the developer shall install sewers in

conformity with such plans.

(5) In acreage subdivisions the subdivider shall not be required to connect to the City sanitary sewage system. (OH. 1035, 1979).

C. Charges and Payment for Sewerage Systems Components.

(1) The developer will bear all costs incurred in the connection, extension and on site development installation of the various sewerage collection components serving the development.

(2) Costs to the developer resulting from the installation of excess capacity components shall be reimbursable from the City of Edmond in accordance with the following;

(a) All charges and payments for excess capacity facilities shall be made on a per-acre basis for the entire drainage area served by the facilities.

(b) These costs will be assessed by the City of Edmond on a pro-rata acre basis to other developers benefiting from said facilities at the prevailing construction cost differential of excess versus actual capacity required

(c) The City of Edmond shall reimburse the developer the assessments collected from subsequent developers benefiting from said facilities for a period of fifteen (15) years or until the developer has been reimbursed eighty percent (80%) of his cost whichever shall sooner occur. In the event the City has obtained easements for the developer, any amounts expended by the city shall be deducted from any subsequent as-

sessments before reimbursement to the developer is made.

(d) The City of Edmond will require any persons who desire to connect to or extend any excess capacity system to pay to the City for the benefit of the developers of all excess capacity systems within the system the pro-rate acre cost for each excess capacity sewer within the system applicable to the property to be served including the use made of any excess capacity main as an adequate lateral.

(e) In the event of multiple excess capacity segments within any excess capacity system, the City will make reimbursements only in the order and sequence constructed. Subsequent reimbursements shall be made to the next succeeding segment in order until all contributing areas are developed.

(f) In the event fees are uncollectible, the City shall not be liable for payment

(3). Charges to the developer resulting from the connection to an existing public sanitary sewer facility shall be payable to the City of Edmond in accordance with the following:

(a) The City of Edmond shall assess the developer a connection charge based on the area of the development.

(b) This assessment shall be $100.00 per acre of the development in question.

D. Ownership of Sewerage Components.

(1) After completion and acceptance of the developer's sewers constructed pursuant hereto, and payment to the City of Edmond and other developers of all amounts required herein and upon connection of developer's sewers to the sewerage system of the City of Edmond said developer's sewers shall thereupon be and become a part of the sewerage system of the City of Edmond, under its exclusive control and operation, subject only to the specific rights reserved to the developer as herein set forth. The City of Edmond shall have the further right to make such connection and cross-connection as it may deem necessary for the proper management and utilization of developer's sewers as an integrated part of the sewerage system of the City of Edmond.

(2) That the City of Edmond may connect any sewers constructed by the City wherein the property to be served by such sewers was within the City's corporate limits as established prior to the date of any excess capacity development and the City may connect sewers of any lawfully constituted assessment district within the City's corporate limits as established prior to the date of any excess capacity development, or sewers to serve any property owned by the City outside its corporate limits regardless of date without being required to make any payment to the developer of any excess capacity main. (Ord. 904, 1977).

CHAPTER 22.21A

PUD PLANNED UNIT DEVELOPMENTS

22.21.A.010 Purpose.

It is the intent of this ordinance to encourage unified design of housing, commercial, industrial or institutional areas and facilities, or combinations thereof, to provide for integrated developments having harmony of design and variety of function. It is not intended to permit a greater density or uses different from those set forth in the regulation of the district in which the development is located, but this section is to provide for a greater flexibility in the design of buildings, yards, courts and circulation than would otherwise be possible Through the strict application of district regulations, and to produce;

(1) A maximum choice in the types of environment and living units available to the public.

(2) Open space and recreation areas.

(3) A pattern of development which preserves frees, outstanding natural topography, and geologic features, and prevents soil erosion.

(4) A creative approach to the use of land and related physical development.

(5) An efficient use of land resulting in smaller networks of utilities and streets and thereby lower housing costs.

(6) An environment of stable character in harmony with surrounding development.

(7) A more desirable environment than would be possible through the strict application of the sections of the ordinance.

The Planned Unit Development Chapter is designed to provide for small and large scale developments incorporating a single type or a variety of residential and related uses which are planned and developed as a unit. Such development may consist of individual lots or it may have common building sites. Common land must be an essential and major element of the plan which is related to and affects the long-term value of the homes and other development. A planned unit development shall be a separate entity with a distinct character in harmony with surrounding development

22.21A.020 Planned Unit Development Authorized.

A Planned Unit Development may be authorized, providing that all of the following provisions are complied with:

(1) Location A Planned Unit Development shall be permitted in any Zoning District

(2) Design Characteristics: The proposed Planned Unit Development shall be designed to provide for the unified development of the area and in accordance with the spirit and purpose of the district in which the unit is located. The design may provide for modification of yard, setback and height requirements on individual lots, but the use, density, intensity of use and coverage requirements for the zoning district as applied to the total area of the Planned Unit Development, and the minimum dimensions established for the design of courts shall not be reduced. Except if otherwise approved for the Planned Unit Development Master Plan

all uses, construction, and requirements in the Planned Unit Development shall comply with the applicable zoning ordinances of the City of Edmond.

(3) The minimum size of site upon which a Planned Unit Development may be situated shall be as follows;

(A) A residential Planned Unit Development only one (1) acre.

(B) When a Planned Unit Development contains both commercial and residential uses the minimum size of the site shall be ten (10) acres.

(C) Residential development as defined herein shall include multiple family development.

(4) Number of Permitted Dwelling Units: It is the intent of this ordinance that the aggregate density and intensity of use within the Planned Unit Development remain the same as that which would be permitted if the area were developed conventionally, but that within the Planned Unit Development, the permitted number of dwelling units may be reallocated irrespective of use district lines or lot lines. The maximum number of permitted dwelling units within a Planned Unit Development shall be computed as follows:

Permitted Dwelling Units Residential Area of the P.U.D. divided by Minimum land area per dwelling unit permitted in the applicable use district.

The residential area for the purposes of the above described computation shall be the gross area of the Planned Unit Development less the lot area or areas designated for any use other than dwellings, quasi-dwellings, residential open space and recreation areas.

The minimum land area per dwelling unit for the purposes of the above described computation shall be the least restrictive minimum land area per dwelling unit permitted in the applicable zoning district. If the Planned Unit Development is with two or more use districts, the permitted density shall be the sum of the permitted dwelling units computed separately for the residential area within each district.

(5) Off-Street Parking: The off-street parking requirements, as required by the applicable zoning Ordinances, may be complied with by providing one or more permanent, common,, off-street parking facilities for all uses within the development, provided that the parking facility contains the requisite number of spaces for each use as required by applicable Zoning Ordinances, and that the spaces provided for permanent residents shall be clearly designated and separated from spaces provided for employees, customers and service. The total spaces provided shall not be less than the sum of the individual requirements and the spaces required for each use, and shall be under the ownership of permanent control of the owners for the use for which the spaces are required.

22.21A.030 Planned Unit Development Review Procedure.

The developer shall follow the below listed steps in an application for approval of a Planned Unit Development. All four (4) of these steps must be completed before the Zoning Ordinances and approved Planned Unit Development Master Plan and Site Development Plans shall take effect. The Planned Unit Development application is a four-step procedure including:

(1) Planned Unit Development rezoning application, Planned Unit Development-Master Plan, and Planned Unit Development Master Plan design statement.

(2) Preliminary plat.

(3) Site development plan.

(4) Final plat.

22.21A.040 Planned Unit Development Application, Master Plan, and Design Statement Requirements:

(A) Planned Unit Development Application: When an applicant desires to develop a Planned Unit Development, be shall first submit to the Planning Commission an application requesting permission to develop a Planned Unit Development. The application shall include:

(1) The applicants/owners names, mailing addresses and telephone numbers.

(2) The street address or general location of the site.

(3) The legal description for the entire Planned Unit Development and the separate areas requesting to be rezoned.

(4) The existing zoning of the property.

(5) The requested zoning of the Planned Unit Development and associated separate use areas within the Planned Unit Development.

(6) The present use of the property.

(7) The type and number of existing structures on the property.

(8) The proposed use of the property.

(9) Generally, the type of structures proposed.

(10) A verified list of property owners of record with addresses located within 300 feet (300') of the proposed Planned Unit Development Rezoning site.

(11) Schedule of Fees: Any person applying for a Planned Unit Development Master Plan shall file a petition with the Planning Commission requesting such proposed Planned Unit Development and shall pay a fee to defray the cost of the public notice and investigation as follows:

(a) "R-1", "R-2" and "A" Districts P.U.D. $50.00 plus $2.00 per acre.

(b) "B", "C-1", "C-2", "C-3" Districts P.U.D. $75.00 plus $5.00 per acre.

(c) "D-0", "D-1", "D-3", "E-1", "E-2", "E-3", "F-1", "F-2", "G-1" Districts P.U.D. $100.00 plus $10.00 per acre.

(B) Planned Unit Development Master Plan: The developer shall also submit with the Planned Unit Development application a Planned Unit Master Plan at a scale of 1" 100', or in developments in excess of one hundred sixty (160) acres at a scale approved by the Planning Department, showing a minimum of the following elements:

(1) Location of proposed land uses.

(2) Statement on the character of the development including general concept of types and sizes of proposed structures, residential densities, and any significant land use features such as, but not limited to slope analysis, soil analysis, areas of trees cover and drainage ways.

(3) Location of Collector Streets and thoroughfares serving the Planned Unit Development.

(4) Sufficient surrounding area to demonstrate the relationship of the Planned Unit Development to adjoining uses, both existing and proposed.

(5) Topography at the scale of 1" 100' and drainage information regarding the number of acres in the drainage area and the indication of the 50-year flood level on all creeks.

(6) Location and size of open space and recreation areas.

(7) Statement of improvements to be made to open space and recreation areas.

(8) Schedule of development if the project will be completed in several stages which shall include the sequence and estimated completion dates of each phase of development, preliminary and final plat, site development plans, building permit plans, occupancy, and such other schedules as the Planning Commission and Council may deem necessary.

(C) Planned Unit Development Design Statement: The developer shall also submit with the Planned Unit Development application and in support of the Planned Unit Development Master Plan a minimum of the following elements in a written text:

(1) The title of Planned Unit Development.

(2) The owners/developers.

(3) The general location of the Planned Unit Development project

(4) A brief description of the Planned Unit Development concept

(5) An acreage breakdown of land uses including figures for each separate zoning area and total dwelling units for residential areas.

(6) The existing zoning and proposed zoning change.

(7) A statement on the existing streets abutting or adjacent to the Planned Unit Development.

(8) A statement on the proposed streets including right-of-way standards and street concepts.

(9) A statement concerning the adjoining uses, conditions both existing and proposed to the development.

(10) Physical characteristics:

(a) Elevation analysis

(b) Slope analysis

(c) Soil analysis

(d) Tree cover analysis

(e) Drainage analysis including drainage area

information.

(11) A statement of utility lines and services to be provided by the developer including commitments by the developer for extensions of utility and off site improvements; however, this statement shall not be interpreted to allow less than those improvements required by City subdivision ordinance, and other ordinances nor shall acceptance of this statement preclude the City from imposing additional requirements for improvements as they are recognized in the course of more detailed planning or as technical standards and ordinances change.

(12) The development concepts as to types, sizes and densities of proposed structures.

(13) A statement of the improvements planned to be made to the open spaces and recreation areas.

(14) A description of the scheduled phases and elements of each phase.

The Planned Unit Development Master Plan shall he considered according to the same procedures followed in a rezoning request concerning application, Planning Commission review, and public hearings. The Master Plan may be accompanied by a request for rezoning of specific areas as required by the Plan, and said rezoning will be considered concurrently with the Master Plan. Upon final approval by the City Council of the Planned Unit Development Master Plan and approval of the appropriate rezoning ordinance, these shall become a part of the Zoning Districts Map. For example: A Planned Unit Development zoned for Two Family Dwelling density shall be designated "B PUD". The ordinance which is passed shall adopt the master plan

by reference and said master plan shall be attached hereto and shall be part of this ordinance and it shall be binding on all existing and subsequent owners. This plan shall control the use and development of said property and all building permits and development shall be in accord with said plan until otherwise amended or changed by the City Council. To serve as a permanent record of the approved Planned Unit Development Master Plan, a reproducible copy of the master plan shall be submitted, along with five (5) prints by the applicant prior to final approval by the City Council. This reproducible copy will he acknowledged by the Mayor and kept on file in the City Clerk's office.

22.21A.050 Preliminary Plat.

Upon approval of the Planned Unit Development Master Plan and the necessary rezoning ordinance(s), the developer shall prepare a preliminary plat for the area of the entire Planned Unit Development according to the procedures outlined in the subdivision regulations of the City of Edmond.

22.21A.060 Site Development Plan.

When an area of the approved Planned Unit Development is ready for development, a site development plan shall be submitted to the Planning Commission for theft approval. The site development plan shall be considered in a public bearing before the Planning Commission and City Council.

(A) The site development plan shall show a minimum of the following elements:

(1) Specific location of all structures including areas where variations in setback, yards, and courts are

planned.

(2) Topography at the scale of 1" = 100' and drainage information regarding the number of acres in the area and the indication of the fifty (50) year flood level on all creeks.

(3) Location of all utility lines and easements.

(4) Location, size and standards for all streets and sidewalks.

(5) Location of all off-street parking.

(6) Location of all open space and recreation area

(7) A detailed landscaping plan including treatment of open spaces, recreation areas, and screening.

(8) Information indicating the percentage of land as defined by land use, such as amount in open space, residential, streets.

(9) Information indicating building coverages, intensities of use and density.

(B) The site development plan shall be accomplished by any necessary support information which would not otherwise be presented upon the site plan.

Upon review, the Planning Commission and City Council shall determine that site development plan conforms to the Master Plan previously approved, including, but not limited to, density, open space, street pattern, recreation facilities, and general function and purpose of the Planned Unit Development.

Additionally, such review may include the requirement of variation or modification of the size, type or location of any advertising signs, any zoning district provisions notwithstanding, upon consideration of such factors as the type and nature of the proposed use, surrounding land uses, aesthetics, and the need for orderly planning and development, in furtherance of the public health, safety and general welfare.

22.21A.070 Final Plat.

Upon approval of the Site Development Plan, the developer shall prepare final plat for submission to the Planning Commission for review, approval, and filing of record according to procedures outlined in the Subdivision Regulations of the City of Edmond. In addition to requirements of the Subdivision Regulations, the Planned Unit Development Final Flat shall include:

(A) Provisions for the ownership and maintenance of common open space as will reasonably insure its continuity and conservation. Open space may be dedicated to a private association or to the public, provided that a dedication to the public shall not be accepted without the approval of the City Council.

A Homeowners' Association shall be created if other satisfactory arrangements have not been made for improving, operating and maintaining common facilities including streets, drives, service and parking areas and recreation areas. When required, the owner(s) shall establish a Homeowners' Association in accordance with the requirements and procedures outlined by the Federal Housing Administration, unless it shall be determined by the City Council that an alternate set of requirements and procedures is more suitable to that particular Planned Unit Development.

(B) Such covenants as will reasonably insure the continued compliance with the approved Planned Unit Development Master Plan. in order that the public interest maybe protected, the City of Edmond shall be made beneficiary of the covenants pertaining to such matters as location of uses, height of structures, setbacks, screening, maintenance of common facilities and access. Such covenant shall provide that the City of Edmond way enforce compliance therewith.

22.21A.080 Issuance of Building Permits.

No Building Permit shall be issued for the construction of any structures and no placement of utilities shall take place on any portion of the Planned Unit Development until the final plat of the areas to be developed and the necessary covenants shall have been filed of record with the County Clerk

22.21A.090 Modifications.

Minor changes in the platted Planned Unit Development may be authorized by the Planning Commission upon review of a proposed amended subdivision plat, incorporating such changes, so long as substantial compliance is maintained with the Master Plan and the purposes and standards of the Planned Unit Development provisions hereof Changes which, in the Commission's opinion, would represent a significant departure from the Master Plan shall require formal abandonment and the subsequent filing of a new application for Planned Unit Development

22.21A.100 Reversion.

The ordinance by which the City Council r& zones the site for a Planned Unit Development shall contain a

provision that the rezoning shall be contingent upon the performance by the applicant of all of the requirements of the Planned Unit Development Ordinance Number 737 and in the event that applicant fails to complete said requirements wherein five (5) years subsequent to approval of the zoning ordinance of the Planned Unit Development then, in that event, the zoning change shall not become effective or operative and the property shall revert to the use shown by said property by the zoning map immediately prior to approval of the Planned Unit Development and in corresponding zoning ordinances. Should only a portion of said Planned Unit Development be completed according to the adopted Master Plan within this time limit, the developer shall be given a thirty (30) day written notice by the City of Edmond, that the undeveloped portion of the property will revert to the use existing prior to the ordinance unless the developer shall show cause to the City Council at a regular City Council meeting why the zoning of said property should not revert to its original use. The City Council may upon such hearing determine that the undeveloped portion of said property shall revert to the use existing prior to the adoption of the Planned Unit Development or the City Council may upon good cause shown extend the time to a date certain of the development of the Planned Unit Development for the completion of the Planned Unit Development If the developer shall not complete the remaining portion within the ex-tended time prescribed by the City Council the undeveloped portion of the Planned Unit Development shall revert to the use immediately prior to the adoption of the Planned Unit Development Ordinance. Good cause as used herein shall mean that the developer shows evidence that he has contracts for continuing the development and has plans pending before the Planning Commission.

Supreme Court, U.S.
FILED
MAY 7 2003
OFFICE OF THE CLERK

No. 02-1297

IN THE
Supreme Court of the United States

SIGNATURE PROPERTIES INTERNATIONAL, LIMITED PARTNERSHIP,

Petitioner,

v.

CITY OF EDMOND, OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

This case presents nothing new to this Court which it has not so recently determined in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Both the trial court and the Tenth Circuit applied extant precedent by this Court faithfully in reaching the clearly compelled finding that it lacked jurisdiction to render the relief requested by Petitioner, that the case was not ripe for adjudication, and that Petitioner should pursue such remedies as state and local law allow it.

In *Pacific Gas & Electric Co. v. State Energy Resources & Development Commission*, 461 U.S. 190, 200 (1983) this Court noted that the basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies form judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." This case exemplifies the wisdom of this rationale in Art. III jurisprudence.

Petitioner comes before this Court having never applied for the building permits it claims Respondent denied him, having never appealed a denial through the municipal agencies instituted for that purpose, and having never sought relief under either Oklahoma's general civil process or her inverse condemnation procedures. In short, as both lower courts have ruled, Petitioner comes into the federal judicial system without any actual case or controversy for adjudication.

STATEMENT OF CASE

The property known as Oak Tree in Edmond, Oklahoma is a planned unit development ("PUD"). The property consists of existing housing, two golf courses, a country club, and property yet to be developed. Development has occurred in phases, an approach not uncommon nationwide. Various developers and owners have developed the property during the course of its history. All plans for development, including that of Petitioner, have announced compliance with Ordinance 737, which declares, *inter alia,* that nothing precludes the City of Edmond from imposing additional requirements for improvement as they are recognized in the course of more detailed planning or as technical standards and ordinances change.

The sanitary sewer system at Oak Tree consisted of lift stations, a system requiring more safety access features and maintenance, which made it more costly and less desirable for the City, which planned to implement a gravity based system. This plan began in 1985 with a study done by the engineering firm of MGR-SMC. Contrary to assertions made by Signature, this was a comprehensive study, not an I & I study for Oak Tree. The long-range plan contemplated the elimination of as many lift stations as possible.

Signature's engineer, Bryan Coon, announced in 1995 that the sewer system Lift Station # 1 would routinely overflow if all platted lots were occupied. City Manager Leonard Smith received a letter from Signature Director of Development Bob Bode advising that design and construction of the sewer upgrade would begin upon the issuance of the 95th building permit following November 1, 1995. Additionally, upon the issuance of the 195th building permit

for new home construction, Signature would finalize the design and commence construction of the new force main and upgrade Lift Station #4. Jerry Smith, Assistant City Manager, wrote back and stated that the City would accept this proposal provide Signature would replace Lift Station #1 or the force main sooner, should they reach capacity prior to the number of permits referenced above. Bode accepted this by return letter.

Through 1996-1998, Signature continued its development at Oak Tree. In January 1999, the City approved development for a portion of Oak Tree known as The Legacy conditioned upon reaching a solution to the sewer problem in 60 days. With Bode gone, Signature now repudiated his agreement. Absent a sewer solution, the City required its staff to come up with an allocation system for the remaining building permits. In 1998, City Manager Martin stated the City's expectation that Signature would honor the Bode commitment. At this time, Signature repudiated Bode's authority. The trial court ultimately determined the agreement not binding on Signature. This portion of the judgment below has not been appealed.

By the Fall of 1998, building everywhere had slowed. Historical statistics indicated the City could safely issue 21 more building permits without overtaxing the sewer system. These were available on a "first come/first served" basis. Neither Signature nor any builder affiliated with it applied. The City then instituted a moratorium from February 1999-August 1999 to determine how many homes could safely be built without fear of frequent overflows at Lift Station #1. An engineer retained by the City reported that additional capacity beyond the 21 permits existed, but an exact number could not be determined.

In August of 1999, building permits again became freely available. From that date, to time of trial in July 2000, Signature did not apply for a single permit. No one applying during that period received a denial. No evidence at trial indicated that anyone on behalf of Signature either appealed a permit denial to the City Counsel or took action under Oklahoma's constitutional and statutory inverse condemnation procedures. (*See* Okla. Const. art. II, Sec. 23; 27 OS Sec. 1, *et seq.)* At trial, Signature presented no evidence of any purchase or building contracts canceled due to the sewer problems, no direct evidence of sales lost due to sewer capacity concerns, and no limitations imposed on property usage. In short, insofar as a "taking" goes, Signature lost nothing not attributable to market forces and competition.

To this writer's knowledge, Signature has still not applied for, much less been denied, a single building permit.

PROPOSITION I

THE TRIAL AND APPELLATE COURTS' RULINGS ON RIPENESS WERE CLEARLY CORRECT

Both the trial court and the Tenth Circuit deemed this case unripe for the purposes of adjudicating the merits of Signature's Takings claims. Signature never received a building permit because Signature never applied for one. As a matter of course one cannot be denied that which one does not seek. Some suggestion arises from Signature's Petition that it feels entitled to advance notice by the City as to permit availability. In effect, Signature's main complaint appears to stem from the fact that the City of Edmond had the temerity to treat it like any other builder or developer: If you'd like a permit, you apply for one. If you do not apply

for one, you do not get one. If you do apply, perhaps one will issue; perhaps not. But you never know the "ifs" and "whys" of that possible denial until you try. Signature never did.

Signature justifies its lack of effort on its own behalf with a cry of "futility." Citing this Court's opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), it claims that the City, by its conduct, gave Signature reason to believe in the futility of the application process which local law provided. *Palazzolo* does not support Signature's position. Contrasted against the record established for this Court by Mr. Palazzolo, Signature's appears a pale and bloodless theory. Mr. Palazzolo did everything he could to obtain a building permit from government officials operating a statutory regime which pronounced any potential plan of development dead on arrival. Signature did nothing.

This Court's precedents concerning the futility exception to the ripeness doctrine has not specified in great detail the quantum of evidence required to establish futility. However, that case law, as well as the plain meaning of the word "futile," lead to a conclusion that futile does not equate to "more likely than not." The common meaning of the word "futile" is "serving no useful purpose: INEFFECTIVE, FRUITLESS." *Webster's Third New Int'l Dictionary* 925 (unabridged edition 1993). "Futility" is defined as "an abortive attempt or useless gesture." *Id.*

Palazzolo held that "federal ripeness rules do not require the submission of further and futile applications with other agencies." 533 U.S. at 626. Further examination of the facts of that case sheds light on what this Court meant by "futile." Anthony Palazzolo owned property which state law declared protected wetland on which filling was prohibited. 533 U.S.

at 614. There existed an exception only if a "compelling public purpose" would be served by the filling. *Id.* A state agency denied the landowner's proposed use, finding that it did not satisfy the "compelling public purpose" standard. In rejecting the board's argument that the landowner's claim was not ripe because he had not submitted applications for other types of development on the land, this Court stated:

> On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.

Id. at 621.

Further applications under those circumstances would have been futile because the state law in question allowed for only one exception, for a "compelling public purpose," and the board already had determined that that exception did not apply. Thus, "futile" in *Palazzolo*, meant "serving no useful purpose." *Webster's* at 925.

Let us compare *Palazzolo* to *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), in which a developer tried to develop a residential subdivision for which its predecessor had received a preliminary approval. 473 U.S. at 177. Over the next few years, parts of the proposed development were given final approval and built. *Id.* at 178. In light of mistakes discovered in the original preliminary approval, the local government asked the developer to submit

a revised preliminary plat. The local government rejected the revised plat on the ground that it did not comply with various ordinances and regulations. *Id.* Page 302 at 180-81. The developer then brought an action pursuant to 42 U.S.C. § 1983, alleging a taking without just compensation.

This Court ruled the developer's claim unripe, noting:

> [R]espondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that *variances could have been granted* to resolve at least five of the Commission's eight objections to the plat.

Williamson, 473 U.S. at 188 (emphasis added). It rejected the contention that denial of approval of the plat "was equivalent to a denial of variances." *Id.* It noted that the regulations in question clearly stated that "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." *Id.* at 189. This Court concluded:

> Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.

Id. at 190. *Williamson* resulted in no finding of "futility" because it appeared to the Court that "variances *could* have been granted" that would have allowed the development to

occur. 473 U.S. at 188. The Court did not speculate on whether it was "more likely than not" that such variances *would* be granted. *See also Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 740, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997) (regulatory taking claim was ripe where "little or no uncertainty" remained as to the value of the petitioner's "transferable development rights"); *MacDonald, Somers & Frates v. County of Yolo*, 477 U.S. 340, 352, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986) (taking claim was not ripe where there was "le[ft] open the possibility that some development will be permitted").

In sum, while this Court has never precisely quantified futility, it has found it where development required filling but, under the laws, there could be "no fill for any likely or foreseeable use," *Palazzolo*, 533 U.S. at 622, and where there was "little or no uncertainty" as to the value of certain development rights, *Suitum*, 520 U.S. at 740; but *not* where there was left open "the possibility of some development," *MacDonald*, 477 U.S. at 352; or where "variances could have been granted" that might have permitted development, *Williamson Planning Commission*, 473 U.S. at 188. *See also Gilbert v. Cambridge*, 932 F.2d 51, 61 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991) ("[t]o come within the exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so).").

These holdings lead inexorably to the conclusion that, where there remains an unexplored *possibility* under the regulations in question that development can occur, a claim is not ripe and the "futility" exception will not apply unless the party claiming futility can show that there was very little likelihood—or no likelihood—that the development would have been approved had that party taken further steps to

obtain approval. This Court articulated the logic of the ripeness requirement in *MacDonald, supra*, 477 U.S. at 348 when it reasoned that

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

The litany of "nevers" in this case clearly led both Judge Cauthron at trial and the Tenth Circuit on appeal to the same conclusion. Signature never experienced a physical taking. Signature never applied for a permit. The City never denied or expressed an intention to deny Signature a permit if it applied for one. Signature never pursued an inverse condemnation action as available under Oklahoma law. Therefore, signature never presented any court, including this one, with a justiciable controversy. Therefore, certiorari should be denied.

PROPOSITION II

THE LOWER COURTS WERE CLEARLY CORRECT WHEN THEY FOUND NO TAKING

Signature bases its contention that a taking occurred on two premises. First, it argues, a taking occurred when the City instituted a six month moratorium while it studied the sewer situation. Next, of course, it alleges that the failure of the City to grant permits for which it never applied denied Signature its reasonable investment-backed expectation.

As a subpoint, it appears that Signature finds even the prospect of limited development a breach of its Constitutional rights since such a limitation, of necessity, falls short of allowing Signature to develop as it would.

As to the moratorium, established precedent establishes beyond peradventure that such temporary takings do not provide the basis for a compensable, if even actionable, claim. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), this Court last visited the issue of temporary takings. In *Tahoe-Sierra*, the court held that moratoriums, totaling 32 months, on development in the Lake Tahoe Basin did not constitute a compensable taking although the moratoriums temporarily deprived affected landowners of all economically viable use of their property. In doing so, this Court rejected both a per se rule which declared all moratoria compensable takings, as well as a narrower rule establishing parameters beyond which a taking would occur. At the heart of that case lay the following observations:

> In rejecting petitioners' per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.
>
> A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process. Unlike the "extraordinary circumstance" in which

> the government deprives a property owner of all economic use, *Lucas*, 505 U.S., at 1017, moratoria like Ordinance 81-5 and Resolution 83-21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or "interim development controls" as they are often called, are an essential tool of successful development. Yet even the weak version of petitioners' categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values.
>
> The interest in facilitating informed decision-making by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.

535 U.S. at 337-339. Mr Justice Stevens then observed "We would create a perverse system of incentives were we to hold that landowners must wait for a takings claim to ripen so that planners can make well-reasoned decisions while, at the

same time, holding that those planners must compensate landowners for the delay." Signature's position here smacks of such perversity.

Moving beyond the moratorium, Signature still failed, as a matter of law, to present a sufficient case for a more global taking claim.

When a taking is absolute, *i.e.*, when the owner is deprived of any economically viable use of his property, no further inquiry is necessary. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999), the Ninth Circuit held, and this Court approved, of the traditional formulation that: "[W]here an owner is denied only some economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations." *Id.* In determining whether the owner has been deprived of any economically viable use, "[t]he standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072-73 (11th Cir. 1996). The trial court had before it evidence, albeit disputed by Signature, that, if credited, established that Signature's property could be used for some single-family residences and that building permits for some residences would most likely have been available.

Signature maintains that such use of the property would not provide it sufficient financial return to return a profit in light of the significant investment into the property. However, the fact that Signature could be left without a profit from

such use of his land, due to its own decision not to make application for a building permit available on the same first-come-first served basis as any other developer, does not and cannot mean that it has lost all economically viable use of the property. If a property owner could insist on his chosen use of the property at issue as the standard by which possible economically viable use must be measured, the standard would have little or no objective value.

To establish an unconstitutional deprivation of property without due process of law, it is insufficient for plaintiff to show only that the regulation deprives him of the best use of his property or that the regulation has caused a severe decrease in the value of the property. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592, 594 (1962). Rather, a plaintiff must show that the regulation interferes so severely with his use of the property as to render the property worthless or useless. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922); *Donohoe Construction Co., Inc. v. Montgomery County Council,* 567 F.2d 603, 608 & n.13 (4th Cir. 1977), *cert denied*, 438 U.S. 905 (1978); *Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F.2d 956, 963 (1st Cir. 1972); *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*, 400 F. Supp. 1369, 1383 (D. Md. 1975). Accord *Williamson, supra*; *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978).

The interference with Signature's property interests, to the extent the City caused any at all, do not rise to the level of substantiality giving rise to a compensable taking under the precedent above. Like covetous neighbors in old Salem Village who uttered cries of "witchery" as a balm upon their own ill fortune thus creating an opportunity to acquire the neighbor's property in the bargain, Signature cries "taking"

in the same voice, in an effort to assuage the vicissitudes of market forces, competition, and its own inaction at the expense of the City of Edmond.

PROPOSITION III

SIGNATURE CLEARLY HAD NO VIABLE CLAIM FOR SUBSTANTIVE DUE PROCESS VIOLATIONS

Signature's substantive due process claims have, if anything, less substance than his takings or procedural due process claims. Still they must be addressed as they arise in the context of this action.

The propriety of the Tenth Circuit's disposition of the substantive due process claim finds illustration in comparison with *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000). In *Forseth*, various landowners brought suit against the Village of Sussex alleging violations of their constitutional rights when the Village wrongfully interfered with their land development. The Forseths, who sought to develop their newly purchased thirty acres of land in the Village, needed the approval of the Village Board to continue the proposed development. The Village Board, however, was led by a Village president who happened to own land abutting the Forseth's land and who greatly objected to the development efforts on the Forseth property. The Village Board ultimately agreed to a reduced development plan for the Forseth property, but only on the condition that the Forseth's convey a 1.85 acre buffer strip of land to the Village president.

The Forseth's then filed suit claiming, *inter alia*, that their substantive due process rights had been violated by the

forced conveyance of land for the personal gain of the Village president. In addressing the Forseth's substantive due process claim, the Seventh Circuit noted that substantive due process has "its greatest appeal when the state acts outside its eminent domain powers, for example by taking property for a private rather than for a public use." *Forseth*, 199 F.3d at 369 (quoting *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993)). But the court cited with approval its decision in *Covington Court. Ltd. v. Village of Oak Brook*, 77 F.3d 177 (7th Cir. 1996), in which it held that "even where a state takes pro rather than a public use, on takings and *due process claims* a plaintiff first must show that it has availed itself of state court remedies." *Forseth*, 199 F.3d at 369-370 (internal citations omitted, emphasis supplied). The court concluded that, despite the "troubling facts and allegations" of official misconduct, the Forseth's "labelled" substantive due process claim falls within the framework for takings claims" and is subject to Williamson's requirement that they first pursue and exhaust their state court remedies. *Id.* at 370 (internal citations omitted).

Signature's allegation of substantive due process violation centers around the allegedly improper moratorium and limitation upon building permits in the Oak Tree area. These have the ultimate effect of depriving plaintiffs of profit. lndeed, plaintiffs' primary requested remedy for this and other counts is an injunction preventing the City form enforcing its permit limitation, requiring specific remedial action on the sewer system, and damages for profits allegedly lost while lots lay idle. These allegations, serious as charges yet insubstantial in proof, do not rise to a level of misconduct that exceeds that found in *Covington* and *Forseth*. In both of those cases, substantive due process claims centered on

official misconduct were still found to be based upon the takings rubric and subject to the *Williamson* ripeness requirement.

It is clear that Signature's efforts in this case focused exclusively upon gleaning profits for idle land, gaining freedom from permit limitations, and the establishment of a constitutional right to the sewer of one's choice. The other allegations clearly play second fiddle to these overriding concerns. As such, the substantive due process count is only a thinly disguised takings claim. Because the labeled substantive due process claim falls within the framework of a takings claim, the claim remains subject to the unfulfilled ripeness requirement.

CONCLUSION

For all these reasons, certiorari should be denied.

Respectfully submitted,

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No. 02-1297

In the

Supreme Court of the United States

SIGNATURE PROPERTIES INTERNATIONAL, LIMITED PARTNERSHIP, a Delaware Limited Partnership,
Petitioner,

v.

CITY OF EDMOND, a Municipal Corporation, Oklahoma County, Oklahoma,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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In its reply brief in opposition, the City has not addressed the questions presented by Signature's petition; rather, the City has attempted to re-characterize Signature's claim as a Fifth Amendment takings claim as opposed to a Fourteenth Amendment due process claim and has attempted to argue the merits of Signature's damage claim for a due process violation.[1] In so doing, the City, through its own inadvertence, has acknowledged and conceded Signature's position on the questions presented - - that being, a conflict does exist

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[1]Signature would welcome the opportunity to present and argue at a trial its evidence on damages. At the first trial, Signature presented evidence that contracts for land purchase were rescinded and canceled due to the sewer system dispute. As stated in its petition, Signature's lost profit from its Oak Tree operations exceeds Four Million Dollars. Sales were at a standstill while this case was pending. Signature is still experiencing the effect as the City has not taken any steps to repair the system and prospective purchasers want to know why the City has not repaired the system since the district court ruled that it has the responsibility to do so. In its brief in opposition, the City acknowledges that the public system as it exists requires more maintenance, making "it more costly and less desirable for the City, which planned to implement a gravity based system." Brief in Opposition, at p.2.

The City's comparison of Signature's complaint that the City's stoppage of its development caused its damage to the cries of witchery in Old Salem is nonsense. Oak Tree is one of the premier residential communities in Oklahoma. For the City to suggest that the City can completely stop Signature's development for approximately 22 months (January, 1999 through the district court's decision in mid-October 2000) without Signature suffering damages, along with the suggestion that any loss Signature suffered is the product of the vicissitudes of market forces and competition, makes one wonder who is trying to practice "witchery". Let us not forget that it was the village leadership of Old Salem that ultimately authorized and carried out the punishment (burning at the stake) suffered by the alleged witches.

among the circuit courts concerning the finality requirement for ripeness to be used when evaluating a due process claim involving restrictions on land usage and that the Tenth Circuit has misapplied the finality requirement for Signature's due process claim under this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

With regard to Signature's due process claim, the City does not discuss the conflict among the circuit courts, but rather cites to the Seventh Circuit's opinion in *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000). In that decision, the Seventh Circuit refused to allow Forseth to pursue a substantive due process claim because the Seventh Circuit believes that Forseth's claim that the Village had forced him to sell a portion of his land at a discount to the Village's board president had to be analyzed as a Fifth Amendment takings claim that required Forseth to exhaust state court remedies before pursuing a claim in federal court. The Seventh Circuit interpreted this Court's decision in *Williamson County* to require exhaustion for the claim and held Forseth could not avoid the exhaustion requirement by classifying the claim as a substantive due process claim. *Id.* at 368-373.

In rendering its opinion in *Forseth*, the Seventh Circuit failed to recognize that this Court in *Williamson County* set forth a separate finality requirement for a due process violation. Exhaustion of state court remedies was not a requirement for ripeness for a due process claim. 473 U.S. at 196-200. The Seventh Circuit's decision in *Forseth* is thus in direct contradiction of this Court's decision in *Williamson County* and the decisions of other circuit courts.

As stated in Signature's petition, other circuit courts, such as the Eleventh, Eighth and Ninth Circuits, have interpreted *Williamson County* differently and have allowed a plaintiff to proceed independently on a substantive due process claim, even though the plaintiff had not exhausted state court remedies for a Fifth Amendment takings claim. *See e.g., Eide v. Sarasota County*, 908 F.2d 716, 724-27, nn.14-17 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988); *see also McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997). Specifically, in *Eide*, the Eleventh Circuit discussed the various theories under which a plaintiff may pursue a claim against a government entity when the entity has either wrongfully taken the plaintiff's property without just compensation or has restricted the plaintiff's use of his property through an invalid exercise of police power which has the same effect as a physical taking of the plaintiff's property. 908 F.2d at 716, 720-27.

Consequently, the City's reference to the *Forseth* decision highlights and emphasizes the need for this Court to accept certiorari in this case to review and resolve the conflict among the circuit courts concerning a claim pertaining to a land use restriction that does not result in a physical takings but has the same effect as a physical takings, particularly where the restriction occurs as a result of an invalid exercise of police power, and to resolve the finality requirement for such a due process claim. As noted by the Eleventh Circuit in *Eide*, the analysis of the type of claim brought by the plaintiff and the ripeness requirement for each type of claim ***only becomes academic if the Supreme Court finally decides*** that these types of land usage claims

are properly addressed by only the just compensation clause or only the due process clause, which to date this Court has not yet finally decided. *Id.* at 721 n.8. Signature's petition gives the Court that opportunity and therefore its petition should be granted.

As pointed out in Signature's petition, Signature's property became essentially worthless during the pendency of this lawsuit because the City stopped Signature's ability to develop its property for resale to homebuilders when Signature refused to surrender to the City's demand that Signature rebuild the existing Oak Tree sewer system owned by the City. Despite the City's statements to the contrary, Signature produced evidence at trial that contracts for sale of property were rescinded and canceled because of the development ban the City imposed on Signature's property. The damages suffered by Signature did not stop with the lifting of the moratorium on the issuance of building permits for already improved lots. It took a ruling by the district court that it was the City's responsibility to rebuild or repair the sewer system in order for the City to lift the development ban on the unimproved lots and allow Signature to resume its ability to make improvements to unimproved property so that additional lots could be available for sale to prospective purchasers.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a case in which where the landowner was only granted a permit to build a beach home if he would grant an easement across his land to the public, this Court stated the building restriction was "not a valid regulation of land use 'but and an out-and-open plan of extortion.'" *Id.* at 839 (quoting other authorities). The same label can be placed on the City's actions in this case.

The City improperly used its police power to stop Signature's development in an attempt to make Signature perform the City's obligation to repair/rebuild the City's sewer system. The City did not have to take that drastic step. As stated in Signature's petition, ***the City itself could have avoided Signature's claim for damages simply by pursuing an action in court for a declaratory judgment, as Signature did, and by allowing Signature to develop while the action was pending. Instead, the City tried to use its police power to extort from Signature the money for a new public sewer.*** As discussed in *Williamson County*, this type of invalid exercise of police power violates the due process clause of the Fourteenth Amendment and the remedy for such an invalid regulation that goes too far is actual damages, and not just compensation. 473 U.S. at 196. The City made a final decision. Now the City should have to answer in damages for its wrongful conduct.

Except for the noted exception set forth in footnote 2, Signature's property has regained the market value it had before the City improperly imposed its ban on Signature's development of its property.[2] As noted by this Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), a temporary prohibition on economic use is not suited for analysis, or compensable under, the takings clause of the Fifth Amendment because the property will recover its value once the prohibition is lifted. With its property returning to the market value it had before the lawsuit once the lawsuit was determined in its favor

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[2]As previously stated, Signature still has to deal with the market effects created by the City's continued failure to take steps to repair the system.

on the declaratory relief claim, Signature does not have a remedy in state court through inverse condemnation proceedings.[3] It can only recover damages if this Court allows it to proceed with a trial on its substantive due process claim. This case demonstrates why all land use restriction cases cannot be properly analyzed as a just compensation claim.

Further, the contentions that Signature's claim should be analyzed as a due process claim and that its due process claim is ripe for review are not defeated by the assertions that the City lifted the moratorium that it imposed on the issuance of building permits for already improved lots and that Signature did not seek any building permits or did not seek a variance from the moratorium. Those arguments are merely a smoke screen. The City made a final decision to stop Signature's development unless it met the City's demands.

The moratorium on the issuance of building permits for the already developed lots was imposed after Signature filed its lawsuit seeking declaratory relief

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[3]Even though the City cries for Signature's claim to be unripe because it has not pursued inverse condemnation proceedings in state court, the City has not denied Signature's recitation of Oklahoma law that an inverse condemnation proceeding may be only pursued in an Oklahoma state court in a situation where the government has properly exercised its police power to take property but not yet paid compensation. Oklahoma inverse condemnation proceedings do not pertain to a situation where, as here, the government has abused its police power to cause actual damages. *See e.g., Curtis v. WFEC Railroad Co.*, 1 P.3d 996 (Okl. 2000); *Mattoon v. City of Norman*, 617 P.2d 1347 (Okl. 1980). This Court has never required a plaintiff to pursue a futile act. *See e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

that the City had the obligation to repair its own sewer system and seeking damages Signature would suffer for the development ban on its unimproved property. The City imposed the moratorium to further place economic pressure on Signature to surrender to its demands and dismiss its lawsuit. The moratorium was lifted after it was in place for only approximately six months because the City's own engineering expert issued an opinion that the system could service at least 225 more homes before an emergency situation existed with the capacity of the system to service the addition. Without any support for the moratorium, the City lifted the moratorium on building permits for the few already developed lots, but left the ban on Signature's right to make improvements on its larger inventory of undeveloped land in place. Signature continued to suffer economic harm from the development ban, which the City did not lift until after the district court issued its ruling that the City had the obligation to repair its own system and could not impose that burden on Signature. It took the district court's ruling to make the City lift the development ban. The finality of the City's decision was not changed by the lifting of the moratorium.[4]

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[4]For the City to now suggest that someone should have requested and sought a variance from the moratorium that would have been granted is totally false and misleading. Signature sells land. Home builders and purchasers who buy from Signature seek building permits. Evidence was produced at trial that the City denied building permits to landowners who requested permits during the moratorium. If the City would have allowed a variance, why did it impose the moratorium? It is obvious that any effort to seek a variance before the moratorium was lifted would have been a futile act. The City is attempting to play the game that this Court stated in *Palazzolo* it would not allow a government entity to play to try to avoid the consequences of a final decision.

As stated in Signature's petition, neither the district court nor the Tenth Circuit stated what remains to be determined in this case before a final decision had been reached by the City. The district court found that the City was wrong in trying to make Signature assume the City's obligation to repair the City's sewer system. The City stopped Signature's development only because Signature would not assume that burden. The City wrongfully chose the option of using its police power to try to force Signature to surrender to its demands. It could have chosen other options to determine who had the responsibility for the sewer system. The wrongful option the City chose caused Signature to be damaged. Signature should be entitled to pursue its claim for the City's violation of its due process rights. Signature's petition should be granted.

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